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No. ———

In the

Supreme Court of the United States

October Term, 1987

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CITY OF PALO ALTO, CITY OF PALO ALTO UTILITIES, and CITY OF ATHERTON,

Appellants,

vs.

CENTURY FEDERAL, INC., UNITED STATES OF AMERICA,

Appellees.

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On Appeal From The United States District Court For The Northern District of California

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APPENDIX TO JURISDICTIONAL STATEMENT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., Plaintiff, vs. CITY OF PALO ALTO, CALIFORNIA, et al., Defendants.	No. C-85-2168 EFL ORDER (Filed September 1, 1987)

The Court has already published two opinions in this case that set forth in great detail the facts surrounding this plaintiff's challenge to defendants' (hereinafter "the Cities") cable television (hereinafter "CTV") franchising and regulatory scheme. *See Century Federal, Inc. v. City of Palo Alto,* 648 F. Supp. 1465 (N.D. Cal. 1986) ("*Century Federal II*"); *Century Federal, Inc. v. City of Palo Alto,* 579 F. Supp. 1553 (N.D. Cal. 1984). At the conclusion of the *Century Federal II* opinion, the Court stated that the Cities did not "necessarily have to open their cable facilities to all comers regardless of size, shape, quality or qualifications." 648 F. Supp. at 1478. In this next stage of the litigation, the Court has asked the parties[1] to address,

[1]On June 6, 1987, the Court certified to the United States Attorney General pursuant to 28 U.S.C. section 2403(a) that the instant cross-motions for summary judgment drew into question the constitutionality of the Cable Communications

(Continued on following page)

through cross-motions for summary judgment, the constitutionality of the four major minimum requirements that the Cities seek to impose on all CTV franchisees: 1) access channels; 2) a "universal service" requirement; 3) state-of-the-art technical and equipment requirements; and 4) various fees, including bonding requirements, a security deposit, reimbursement for the Request for Proposals ("RFP") process, and franchise fees.

Having surveyed the relevant case law and applying the rationale and legal conclusions already reached in *Century Federal II*, the Court has concluded that defendants' access channel, universal service, and state-of-the-art requirements violate the first amendment of the United States Constitution.[2] The Court has also determined that subjecting CTV operators to municipality-imposed fees in excess of the Cities' costs from the franchising process is not *per se* unconstitutional, but the fees question raises a

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(Continued from previous page)

Policy Act of 1984, 47 U.S.C. section 521 et seq. ("Cable Act"). The United States responded that the Cable Act simply vests in local government bodies the authority to regulate cable television within the guidelines of the Act. Because the Cable Act authorizes, but does not mandate, the minimum requirements addressed in this Order, the Court does not herein purport to make any determination on the constitutionality of any particular provisions of the Act.

[2]In addition to first amendment grounds, plaintiff has challenged the minimum requirements on fifth amendment "taking," equal protection, and substantive and procedural due process grounds. Because the Court invalidated the first three requirements under the first amendment, it was unnecessary to reach the other constitutional issues. Similarly, the Court found it unnecessary to reach any state constitutional issues. *See Century Federal II*, 648 F. Supp. at 1468 n.5. As for the numerous constitutional challenges to the various fees imposed by the ordinance, see the Court's discussion in the text *infra*.

number of factual issues and unanswered questions of law that cannot be definitively decided on the record now before the Court.

I. ACCESS CHANNEL REQUIREMENTS

In response to this Court's decision in *Century Federal II*, on March 9, 1987 the City Council of the City of Palo Alto, acting behalf of all defendants, passed Ordinance No. 3744 ("Ordinance"), which approved and awarded a franchise to plaintiff. The Ordinance requires all CTV operators to provide eight leased access channels to unaffiliated persons at negotiated rates. Ord. §§ 3.7.01-3.7.05. The Ordinance also requires three public and educational channels and two governmental channels ("PEG" access), *id.* §§ 4.2, 4.3, which the franchisees can satisfy by collaborating to provide a single set of such channels. *Id.* § 4.1.

Clearly, if such access requirements were applied to the traditional press, such as newspapers, they would violate the first amendment. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401 n.1 (9th Cir. 1984), *aff'd*, 106 S. Ct. 2034 (1986) ("Imposing access requirements on the press would no doubt be invalid."); *see also Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S. Ct. 903 (1986) (plurality opinion); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Only once to date has the Supreme Court "sustained a limited government-enforced right of access," which was in the case of the broadcast media. *Pacific Gas*, 106 S. Ct. at 908 n.6. This Court has already concluded that the justification for such governmental intrusion into the broadcast media, the physical scarcity of radiowaves, is inapplicable to the instant case. *Century Federal II*, 648

F. Supp. at 1471. Finding that "'the analogy [of cable television] to more traditional media is compelling,'" *id.* at 1472 (quoting *Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434, 1459 (D.C. Cir. 1985), this Court concluded that, except for its impact on the public domain, "the defendant Cities as a matter of law have failed to persuade this Court that there are any other differences attributable to cable television that can justify a degree of first amendment protection similar to that applied to the broadcast medium." *Century Federal II*, 648 F. Supp. at 1475.

Accordingly, the rationale in *Miami Herald and Pacific Gas* applies to the access requirements in the instant case. The Cities attempt to distinguish *Miami Herald* and *Pacific Gas* on the ground that the access requirements in those cases were triggered by the newspapers' content, while the access channels here are imposed automatically on all CTV operators regardless of any other programming they cablecast. The Cities read these cases too narrowly.

Regardless of how the Cities attempt to characterize the access channels, their result is undeniable: a CTV operator will be forced to cablecast material by other speakers that it might otherwise choose not to present. Just as in *Miami Herald* and *Pacific Gas*, such forced access has two independent, impermissible effects on a cable operator's right to speak. *See Pacific Gas*, 106 S. Ct. at 908.

First, forcing a speaker to communicate the views of another undoubtedly impacts the content of the speech of the primary speaker. In the case of the traditional press, and in this Court's opinion CTV operators, this impact is inconsistent with the principles of the first amendment. *See id.* The Cities cannot deny that the PEG channels,

which are directly or indirectly controlled by city government,[3] could very well provide a conduit for criticism of the CTV operator. Even the leased commercial access channels, over which the CTV operators have control, carry the impermissible risk of effecting the programming of the CTV operator. As the Supreme Court has stated, a "[g]overnment-enforced right of access *inescapably* 'dampens the vigor and limits the variety of public debate.' " *Id.* at 908 (emphasis in original) (quoting *Miami Herald*, 418 U.S. at 257).

Admittedly, the access channels provide other cable speakers regular and constant access that is not necessarily dependent on the content of any franchisee's speech. The content sought to be cablecast by the access users, however, will be influenced by what the franchisee cablecasts (why cablecast programming that is already on another channel?), and the reverse is also certain to be true: the material on the access channels will influence what the franchisee presents on its channels.[4] This indirect effect is no

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[3]The content of the government-access channel is obviously under the direct control of the city governments. The Cities do note, however, that an *"independent"* community access organization ("CAO") will regulate the public and educational access channels. Ord. §§ 1.16, 4.3.02 & App. E. A simple reading of the Ordinances' relevant provisions, however, leaves this Court with grave doubts about how "independent" the CAO will be from the City Council and City Manager.

[4]The Supreme Court has never required an actual showing of such an influence or chilling effect on the primary speaker's content. There was no such showing in either *Miami Herald* or *Pacific Gas;* it is the mere risk of such a chilling effect that is inconsistent with the first amendment. *But see Pacific Gas,* 106 S. Ct. at 919-20 (Rehnquist, J., dissenting) (arguing that any such effect should be direct and immediate before the heightened first amendment scrutiny of *Miami Herald* should be applied).

less impermissible than the direct effect of a right-to-reply statute in *Miami Herald*. *Pacific Gas*, 106 S. Ct. at 909.

The second impermissible effect of forced access channels is an intrusion into a CTV operator's considerable editorial functions, *see Century Federal*, 648 F. Supp. at 1472 & n.12, which results regardless of whether the access would force a speaker to forego the communication of a particular opinion or material. *Miami Herald*, 418 U.S. at 258. Speaking of the function of newspaper editors, which this Court believes is closely analogous to the editorial functions of a CTV operator, the Supreme Court in *Miami Herald* stated: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press . . . ." *Id.*

Because the Ordinance's access requirements must be characterized as content-based, they "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 65 (1974).

The Cities have simply not met this burden. As this Court stated in *Century Federal II* in a review of Supreme Court precedent, " 'the purpose of the First Amendment is to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .' " 648 F. Supp. at 1477

(quoting *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 390 (1969)). The Constitution also " 'command[s] that government itself shall not impede the free flow of ideas . . . .' " *Century Federal II*, 648 F. Supp. at 1477 (quoting *Miami Herald*, 418 U.S. at 252). The access channels forced upon plaintiff by the Cities carry the inherent risk that a franchisee's speech will be chilled and the direct, undeniable impact of intruding into the franchisee's editorial control and judgment of what to cablecast and what not to cablecast. Neither result can be tolerated under the first amendment in the name of an "attitude that government knows best how to fine tune the flow of information to which [the people] have access." *Century Federal II*, 648 F. Supp. at 1477.

II. "UNIVERSAL SERVICE" REQUIREMENT

The Ordinance requires the franchisee to wire the entire Service Area except where access is not feasible. Ord. § 3.2.

The Court finds that essentially the same analysis on access channels applies here to invalidate the universal service requirement. Could the Cities require a newspaper, movie house, or bookstore to deliver to or be located in a particular geographic area of the community on the ground that it is in the best first amendment interests of the residents in that area? Surely, the answer is no.

The first amendment protects both the right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). As the Supreme Court stated in *Pacific Gas*: "The essential thrust of the First Amendment is to prohibit improper restraints on

the *voluntary* public expression of ideas . . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Pacific Gas*, 106 S. Ct. at 909 (emphasis in original) (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 105 S.Ct. 2218, 2230 (1985)).

Dictating to whom plaintiff cablecasts is an impermissible burden on a CTV operator's first amendment right to determine where and when it speaks. As with the access channel requirement, the Court finds this to be a content-based regulation that the Cities have not sustained by showing that the "regulation is a precisely drawn means of serving a compelling state interest." *See Consolidated Edison*, 447 U.S. at 540; *Bellotti*, 435 U.S. at 786; *Buckley*, 424 U.S. at 65.

III. "STATE-OF-THE-ART" REQUIREMENTS

The Ordinance requires the franchisee to construct a "state-of-the-art" system. Ord. § 3.1. The Ordinance further dictates that "to the extent that the Company and the City reasonably mutually determine that it is economically viable and feasible to do so," the franchisee shall maintain and upgrade its services and technical performance "to keep pace with developments in the State-of-the-Art of [cable] technology." *Id.* § 3.9.01. The Ordinance also mandates several specific equipment and technological requirements, including that the cable system be fully two-way and interactive so that it can support services such as two-way conferencing and high-s[p]eed data transfer. *Id.* §§ 3.6, 4.5.01 & App. A, and that two coaxial cables are

installed, only one of which need be activated immediately. *Id.* App. A.

The Court finds that the state-of-the-art requirements in the Ordinance are government regulations of noncommunicative aspects of speech. The propriety of governmental regulations of noncommunicative aspects of speech is judged by the standard enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968). *Century Federal II*, 648 F. Supp. at 1475. Under the *O'Brien* test, a regulation is constitutional only if (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on first amendment freedom is no greater than is essential to further that interest. *O'Brien*, 391 U.S. at 377. The Cities bear the burden of proving that all of the elements of this test are satisfied. *Century Federal II*, 648 F. Supp. at 1475.

Because this Court finds that, as a matter of law, the Cities have not satisfied the second prong of the *O'Brien* test, it is not necessary to analyze the state-of-the-art requirements under the other elements of the test.

The only legally recognized important or substantial governmental interest proffered by the Cities to justify the technical/equipment requirements is cable television's disruption to the public domain. *See id.* at 1477. The gist of the Cities' vague argument here is that unless the Cities ensure the installation of a technologically advanced system, which includes all the features the Cities believe their residents would use, the CTV operators will need to frequently dig up old cables and unnecessarily disrupt the

public domain. *See* Defendants' Reply Memorandum in Support of Motion for Partial Summary Judgment at 1. The Cities provide absolutely no probative evidence supporting the reasonable possibility that this might be the case. In light of the Cities' burden in satisfying the *O'Brien* test, such speculation cannot save the state-of-the-art requirements.

The Cities have not created a genuine issue of material fact in support of their argument that the technical/equipment requirements further the important or substantial government interest in minimizing cable television's disruption to the public domain. *See Century Federal II*, 648 F. Supp. at 1477-78. Consequently, the state-of-the-art requirements are an impermissible burden on plain[ti]ff's first amendment rights and must be strickened from the Ordinance.

IV. FEES

The Ordinance requires the franchisee to meet a number of financial obligations. First, the Ordinance requires the franchisee to post construction performance and payment bonds in the amounts of $1,000,000 and $500,000 respectively, and at the discretion of the City Manager, a franchise performance bond in an amount up to $100,000. Ord. § 6.16. Second, the Ordinance requires the franchisee to reimburse the Cities for a pro-rata share of the $350,000 that the Cities incurred in consulting fees during the RFP process, *id.* § 10.2.02, and to reimburse the Cities for any costs they incur in renewal or amendment of the franchise. *Id.* § 10.2.04. Third, the Ordinance requires the franchisee to provide a "security fund" in a total initial amount of

$1,000,000. *Id.* § 17.2. Finally, the franchisee is obligated to pay the Cities an annual franchise fee of five percent of its annual gross revenue. *Id.* § 10.1.01.

Quite understandably in light of the page limitations imposed on the parties' briefs and the number and complexity of the issues that have been addressed on the instant motions for summary judgment, the briefing and evident[i]ary support on the Ordinance's various financial provisions was too vague and incomplete for the Court to make any definite determinations on these provisions. Before addressing which matters require additional briefing and evident[i]ary support, the Court will make several observations about the applicable law.

Plaintiff agrees that the Cities are entitled to require construction and performance bonds, but argue that the amount of the bonds should be no greater than that imposed on Pacific Bell.

Both sides also agree that the Cities can pass onto the CTV operators the reasonable administrative costs of the franchising program. *See Murdock v. Pennsylvania,* 319 U.S. 105, 113-14 (1943); *Fernandes v. Limmer,* 663 F.2d 619, 633 (5th Cir. 1981), *cert. denied,* 458 U.S. 1124 (1982); *Baldwin v. Redwood City,* 540 F.2d 1360, 1371 (9th Cir. 1976), *cert. denied,* 431 U.S. 913 (1977).

Plaintiff, however, contends that any fees imposed by the Cities beyond such administrative costs is a discriminatory tax on the press that burdens rights protected by the first amendment. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 582 (1983). In *Minneapolis Star,* the Supreme Court struck down a state "use tax" on the cost beyond the first

$100,000 of paper and ink consumed in the course of the production of a written publication. The practical effect of the "use tax" was to impact only the large newspapers in the state. The Court determined that "a tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action," *id.* at 592-93, and that to satisfy that burden, the government must demonstrate "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585. The Court concluded that although the asserted state interest, generating revenue, was compelling, it could be achieved as effectively by a general tax on all businesses. *Id.* at 586.

While disputing the application of the *Minneapolis Star* rationale to invalidate the Ordinance's financial provisions, the Cities cite for support *Gannet Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d 767 (2d Cir. 1984), and *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987). *Gannett* upheld a revenue-raising fee imposed by the Metropolitan Transportation Authority ("MTA") on the placement of coin-operated newspaper vending machines in MTA commuter train stations. The court in *Gannett* distinguished between the cases prohibiting licensing fees and the facts before it on the ground that in the former cases the government acted in a government capacity in "raising general revenue under the guise of defraying administrative costs," 745 F.2d at 774, while the MTA operated in a proprietary capacity by charging reasonable rent for the use of business property that it happened to own. *Id.* at 775. In *Erie*, a district court recently upheld a municipality-imposed annual franchise

fee on CTV operators equal to five percent of the operator's annual gross revenues. The court held that such fees were merely fair rental value of the property interest the CTV operator received with the franchise. "[A]s a city holds the streets in trust for the public, it would [be] a dereliction of a city's fiduciary duty to grant franchise rights . . . without receiving the fair market value for the property." *Erie*, 659 F. Supp. at 595.

Plaintiff's brief was notably silent on the issue of whether the Cities could impose a franchise fee based on plaintiff's substantial use of the public domain. Without deciding the issue, this Court is fairly confident that such a fee, at least if set by the fair market value of the property interest the CTV operator receives, is sustainable under the *O'Brien* test. Clearly, however, any fee beyond that designed to offset administrative costs is not *per se* unconstitutional.

In order to determine whether there exists any genuine issues of material fact on the challenge to the fees, the Court requests both sides to submit the following additional support:

1) By 5 p.m., Friday, September 18, 1987, the Cities should file with the Court a ten-page brief arguing for the constitutionality validity of *each* financial obligation imposed on plaintiff by the Ordinance. The brief should include a discussion of the *Minneapolis Star*, *Gannett*, and *Erie Telecommunications* cases. One of the Court's particular concerns is whether the application of the *O'Brien* test, specifically the fourth prong, empowers this Court to limit the amount of any franchise fee to no greater than the fair rental value of the property interest plain-

tiff receives with the franchise. Finally, the brief should address all of the plaintiff's constitutional challenges to the fees, with special attention to the equal protection implications. *See, e.g., Erie*, 659 F. Supp. at 603-04.

The Cities' brief must also be supported with evident[i]ary documentation and declarations answering the following questions:

a) How does the amount of the construction and performance bonds required by the Ordinance compare with the amounts the Cities require of similarly situated users of the public domain?

b) What do the Cities contend their administrative costs are, and are the reimbursement provisions at sections 10.2.02 and 10.2.04 designed to cover such costs? Also, do the Cities contend that plaintiff should be required to help fund an Ordinance that has, in large part, been declared unconstitutional?

c) What exactly is the purpose of the "security fund" at section 17.2? What costs are this fund designed to cover? The Court's reading of the provision suggests that the fund is simply a kind of liquidated-damages fund. If this is indeed its purpose, can it withstand constitutional muster?

d) Do the cities contend that the five percent annual franchise fee is a reasonable charge for plaintiff's use of the public domain?

2) Plaintiff may respond by 5 p.m., October 2, 1987 with a ten-page brief and any supporting documentation. Specifically, plaintiff should address the application of

the reasoning underlying *Gannett* and *Erie Telecommunications.*

3) No reply brief will be necessary. No oral argument will be heard on the fees unless so otherwise ordered by the Court. Finally, the United States is not required to submit a supplemental brief on the fees.

IT IS SO ORDERED.

IT IS ALSO ORDERED that the parties appear for a status conference on Thursday, October 8, 1987 at 8:45 a.m.

DATED: September 1, 1987.

/s/ EUGENE F. LYNCH
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., a California Corporation, Plaintiff, vs. CITY OF PALO ALTO, CALIFORNIA, a Municipal corporation; CITY OF PALO ALTO UTILITIES, a Municipal utility; CITY OF MENLO PARK, CALIFORNIA, a Municipal corporation; and CITY OF ATHERTON, CALIFORNIA, a Municipal corporation, Defendants.	No. C-85-2168 EFL ORDER GRANTING PARTIAL SUMMARY JUDGMENT (Filed December 3, 1986)

This action involves an aspiring cable television operator's first amendment challenge to the defendant municipalities' use of an exclusive franchising arrangement to limit to one the number of cable operators granted access to those facilities necessary to install cables within the defendants' boundaries. Plaintiff now moves for an order granting partial summary judgment on the issue of liability, asking this Court to hold as a matter of law that such a government-imposed restriction on the number of cable speakers is facially invalid under the first amendment.

After considering oral argument and reviewing the extensive briefs and exhibits filed on both sides, this Court hereby grants plaintiff's motion for partial summary judgment. In doing so, the Court holds only the following: First, that under the undisputed facts of this case, the insignificant, if any, increase in disruption to the public domain resulting from the initial installation of more than one cable system, as opposed to a single system, does not constitute a substantial or important governmental interest so as to justify the suppression of all cable speakers except the one to which the municipalities grant permission to speak; and second, that because cable television is more closely analogous to newspapers than the broadcast media, the fact that the cable television market in a proposed service area is a natural monopoly does not justify greater governmental regulation of cable operators than would otherwise be allowed under the first amendment.[1]

I. *Background*

Plaintiff Century Federal, Inc., is an aspiring cable television (hereinafter "CTV") operator. The defendants (hereinafter "the Cities") are three California municipalities, Atherton, Menlo Park, and Palo Alto, and a utility company owned by Palo Alto. Plaintiff attempted to enter the CTV business in each of the Cities, but was refused a business license and was told that it must participate in the

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[1]Although plaintiff's complaint on its face challenges the very existence of the Cities' franchising process, including the minimum requirements a cable television operator must meet before being eligible for a franchise, see *infra* note 3, on this motion the Court expresses no opinion on any aspect of the franchising process other than that part which limits to one the number of operators initially granted access to the facilities necessary for the installation of a cable system.

franchise selection process conducted by Palo Alto on behalf of all the Cities. Plaintiff also sought permission to use the utility poles owned by the Pacific Telephone and Telegraph Company, the Pacific Gas and Electric Company, and the defendant City of Palo Alto Utilities, but was refused "pole attachment services" because it had no CTV operating franchise.[2]

The franchise selection process conducted by the Cities had two parts. First, the Cities issued a Request for Proposals (hereinafter "RFP"). This document specified the minimum requirements that an applicant must meet in order to be considered for a franchise.[3] The RFP also requested certain technical, construction, ownership, and financial information concerning the applicant and its proposed system. The Cities planned subsequently to evaluate the applicants in a number of categories, including service and rates, technical/construction, financial, local commitment, and ownership/structure.

The second phase of the selection process involved negotiations with one or more of the so-called most qualified applicants. Although the RFP guidelines expressly referred to the granting of a "nonexclusive" franchise, implying that the Cities might grant a franchise to more than one CTV operator, it is undisputed that the Cities intended

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[2]Section 53066 of the California Government Code authorizes municipalities to license or franchise the construction of CTV systems using public property and easements. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1400 (9th Cir. 1985), *aff'd*, 106 S. Ct. 2034 (1986).

[3]An opinion published earlier in this case, Century Federal, Inc. v. City of Palo Alto, 579 F. Supp. 1553 (N.D. Cal. 1984), lists in detail the minimum requirements set forth in the RFP. *Id.* at 1554 n.3.

to grant a franchise to only one operator, at least initially. *See Central Telecommunications, Inc. v. TCI Cabletelevision, Inc.*, 800 F.2d 711, 712 n.1 (8th Cir. 1986) (under a similar RFP, court refers to such franchises as "de facto exclusive").

Of the four CTV operators who answered the RFP, which did not include plaintiff, the Cities targeted two for further negotiations. On October 7, 1985, the Cities awarded a franchise to Cable Coop, which, at least up until the date of oral argument on this motion, had not yet begun to install its CTV system.

Rather than participate in the RFP, plaintiff originally filed suit in this Court in September 1983, alleging that the franchising process as a whole violated the antitrust laws and the first amendment. *See Century Federal, Inc., v. City of Palo Alto*, 579 F. Supp. 1553 (N.D. Cal. 1984). On the antitrust claims, the Court granted defendants' motion to dismiss on the ground that the defendant municipalities were immune from liability for the challenged conduct. *Id.* at 1561. The Court denied the Cities' motion on the first amendment claims, however, finding that plaintiff's pleadings alleged a cognizable constitutional deprivation that gave rise to significant factual questions that could not be resolved on the pleadings alone. *Id.* at 1565.

Subsequent to the above rulings, in January 1985, in response to the passage of the Cable Communications Policy Act of 1984, 47 U.S.C. sections 521-611 (Supp. 1986),

this Court dismissed plaintiff's original first amendment claims without prejudice.[4]

In early March 1985, however, the Ninth Circuit decided *Preferred Communications, Inc., v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1984), *aff'd*, 106 S. Ct. 2034 (1986) (hereinafter "*Preferred I*"). Reversing in part the district court's granting of a motion to dismiss, the Ninth Circuit held in a wide-ranging opinion that a municipality could not "limit access by means of an auction process to a given region of [a] City to a single cable television company, where the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system[.]" *Preferred I*, 754 F.2d at 1411.

Within a few days after the release of the Ninth Circuit's decision, plaintiff filed the instant action, reasserting its first amendment claim.[5] The parties stipulated that the

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[4]This Court had hoped that the Communications Policy Act would resolve this litigation. The Act was intended to establish a comprehensive national CTV policy and envisions a franchising arrangement such as that proposed by the Cities. *See Preferred I*, 745 F.2d at 1400 n.3. The constitutionality of that Act is not being directly challenged in this litigation, but the Ninth Circuit has called into question the constitutionality of a number of its provisions in strong dicta in the *Preferred I* decision. *See id.* at 1401 n.4, 1411 n.14.

[5]In its earlier complaint, plaintiff also alleged a violation of the California constitution, but the parties did not assert any differences between plaintiff's rights under the first amendment and under the state constitution. *Century Federal*, 579 F. Supp. at 1554 n.1. In the instant action, plaintiff's complaint includes a challenge under the California constitution, but nearly all of the parties' discussion has focused upon the first amendment. Because this Court has found a violation of the first amendment, we do not reach the state constitutional issues.

pleadings and record of the prior action would be considered a part of this new action.

After the United States Supreme Court granted certiorari on the *Preferred I* decision, this Court stayed the disposition of the instant action pending the Supreme Court's decision. In *City of Los Angeles v. Preferred Communications,Inc.*, 106 S. Ct. 2034 (1986) (hereinafter *Preferred II*), the Supreme Court affirmed the judgment of the Ninth Circuit "on a narrower ground," *id.* at 2036, holding only that a CTV operator "seeks to engage [in activities that] plainly implicate the First Amendment," *id.* at 2037, and refusing to decide the applicable first amendment standard solely on the pleadings. *Id.* The Court left open the question of "whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." *Id.* at 2038 (Blackmun, J., concurring).[6]

Two weeks after the Supreme Court's decision, plaintiff filed the instant motion for partial summary judgment.

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[6]The parties have disputed the precedential effect of the Ninth Circuit's *Preferred I* decision in light of the Supreme Court's holding, particularly with regard to the Court's remark that i[t] was affirming on a "narrower ground." *Preferred II*, 106 S. Ct. at 2036. To date, it appears that the Ninth Circuit interprets the Supreme Court's holding as an affirmation that is binding on the lower courts of this Circuit. *See* Pacific West Cable Co. v. Sacramento, No. 85-2143, slip op. at 6 (9th Cir. Aug. 20, 1986) (citing *Preferred I* as affirmed by the Supreme Court). The more difficult question is discerning which parts of the Ninth Circuit's opinion are essential to its holding and which parts are dicta. *See* Tele-Communications of Key West v. United States, 757 F.2d 1330, 1338 n.3 (D.C. Cir. 1985) (expressing uncertainty on the "precise basis" for the Ninth Circuit's opinion in *Preferred I*).

Essentially, plaintiff's position is that the suppression of all cable speakers except one cannot be justified by any important or substantial governmental interest.[7] The Cities, on the other hand, propose five interests that are furthered by a franchising process that allows access to only one CTV system:[8] 1) minimizing disruption of the public domain;

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[7]The reference to "important or substantial" government interests is based on the second step of the *O'Brien* test, O'Brien v. United States, 391 U.S. 367, 377 (1968), which, as explained below, the Court finds determinative in the disposition of this motion. The Ninth Circuit also refers ot such interests at "legitimate." *Preferred I*, 754 F.2d at 1406.

[8]The Cities dispute the characterization of the franchising scheme as restricting access to only one CTV operator on the ground that the mandatory commercial access channels provided by the chosen franchisee will guarantee to other nonfranchised CTV operators an opportunity to "speak" to the Cities' residents. Such a contention, however, is based on the faulty premise that the first amendment allows the government to infringe on the free speech rights of a speaker based on a possibility that there are alternative avenues of communication available to reach the desired audience. "[O]ne is not to have the exercise of his liberty of expression in an appropriate place abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939). Furthermore, a franchised operator might have use of as many as fifty or more channels on its own system, but a nonfranchised operator as few as one under a commercial access program.

In a separate opposition brief, defendant Menlo Park objects to the characterization on a different basis. Breaking from the other defendants, Menlo Park concedes that under the Ninth Circuit's *Preferred I* decision "it may lack authority to artificially limit to *one* the number of cable operators in Menlo Park." Defendant Menlo Park's Memorandum in Opposition, p. 3 (emphasis in original). Menlo Park claims that it is not attempting to limit to one the number of CTV operators in Menlo Park, but only seeks a "limited right" in a potential natural monopoly market to decline issuing additional franchises until its chosen operator has had the "reasonable opportunity to establish serv-

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2) promoting first amendment values by ensuring that their residents, who allegedly live in a market that will economically support only one CTV operator (i.e., a natural monopoly), will receive cable service from that CTV operator that will provide the most reliable and highest quality service; 3) preventing "cream skimming," which is the wiring of only affluent, and therefore more profitable, portions of the franchise area; 4) ensuring community and commercially-leased access channels; and 5) encouraging the development of state-of-the-art cable systems with adequate channel capacity.

II. *Standard of Review on a Motion for Summary Judgment*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Consequently, the "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment: the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986) (emphasis in orig-

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ice." *Id.* at 1-2. Of the various weaknesses inherent in Menlo Park's position, the most compelling is that, if this Court finds that the initial rest[r]iction violates the first amendment (as we do), Menlo Park's argument is tantamount to claiming that the immediate Constitutional infirmities of its regulation are somehow cured retroactively by a subsequent change in the process that will make it Constitutional at that later time.

inal). The Supreme Court has described the district court's review of the facts as a two-step process. First, the court must determine whether a particular fact is material, that is, a fact that will affect the outcome of the suit under the applicable substantive law. *Id.* "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Second, if a fact is material, the court must determine if the dispute about the material fact is "genuine," that is, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Accordingly, this Court's initial inquiry must be on the materiality of the various factual questions. In the instant case, the Court must review each of the governmental interests alleged by the Cities and determine which of these, if any, the substantive law recognizes as important or substantial so as to justify the resultant impact on the first amendment rights of potential CTV operators. Only after a determination that an interest is important or substantial can the Court reach the issue of whether genuine issues of fact exist on the question of whether the franchising process "furthers" that interest.[9]

III. *Cable Television and the First Amendment*

The United States Supreme Court has left no doubt that a CTV operator is a speaker entitled to first amendment protection. *Preferred II*, 106 S. Ct. 2034, 2037 (1986). The Court did not state, however, the degree of protection

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[9]For example, because the law recognizes disruption to the public domain as an important or substantial governmental interest, *see Preferred I*, 754 F.2d 1406, this Court must determine whether genuine issues of fact exist on the amount of disruption that will occur if the Cities' franchising scheme initially allowed access to more than one CTV operator.

to which a CTV operator is entitled or the amount of governmental regulation of that medium permissible under the first amendment. The threshold issue on this motion, therefore, is whether the first amendment allows the government the same wide latitude in regulating the CTV industry as it allows in the broadcast medium, *see Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 63 (1943), or whether the degree of protection should be closer to that enjoyed by the traditional media, such as newspapers.[10] *See Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

As defendants' lead counsel admitted at oral argument, if this Court were to apply the same degree of protection that more traditional forms of the media receive, the Cities' restriction on access to its residents obviously would violate the first amendment. We recognize that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 at 386. Application of a lesser standard of protection, however, is an exception to the rule that must be justified by a particular difference. When the Supreme Court was faced with the question of whether a lesser first amendment standard applied to films, it stated that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make

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[10]As the parties did, the Court will use newspapers as an example of the more traditional forms of public communicators, such as book publishers, public speakers, and pamphleteers, *see Preferred II*, 106 S. Ct. at 2037, that are entitled to a more protective first amendment standard than the broadcasting media.

freedom of expression the rule. There is no justification in this case for making an exception to that rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). Consequently, in developing the first amendment standard to be applied in this case, the question becomes whether there are any differences in the characteristics of the CTV medium that justify a lesser standard of protection for it that would allow a correspondingly greater degree of governmental regulation.

A. *Lack of Physical Scarcity in the Cable Television Medium*

The Ninth Circuit has recognized that the greater degree of governmental regulation of broadcasting rests on the physical scarcity of radiowaves. *Preferred I*, 745 F.2d 1396, 1403 (9th Cir. 1985), *aff'd*, 106 S. Ct. 2034 (1986). As this Court noted earlier in the instant case, "the electromagnetic spectrum is simply not physically capable of carrying the messages of all who desire to speak over it. This principle has been reaffirmed many times." *Century Federal, Inc. v. City of Palo Alto*, 579 F. Supp. 1553, 1563 (N.D. Cal. 1984) (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973); *Red Lion*, 395 U.S. at 389).

Notwithstanding its application to the broadcast medium, the Seventh and D.C. Circuits have expressly concluded that the "physical scarcity rationale" is irrelevant to an evaluation of government regulation of cable television. *Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434, 1449 (D.C. Cir. 1985) ("[T]he 'scarcity rationale' has no place in evaluating . . . cable television."); *Omega Satellite Products v. City of Indian-*

apolis, 694 F.2d 119, 127 (7th Cir. 1982) ("[F]requency interference [is] a problem that does not arise with cable television.").

The opinions from these two Circuits strongly suggest that physical scarcity could never arise in a cable television setting. The Ninth Circuit, however, expressly left open the question of how a municipality should "allocate access to poles and conduits to competing cable systems when these structures are incapable of accommodating all those seeking access," because plaintiff had alleged that space was available and the court assumed that fact to be true. *Preferred I*, 754 F.2d at 1404.

In any event, this Court also finds it unnecessary to address the issue of whether physical scarcity could ever arise in the CTV medium because defendants admit that there is no physical scarcity in the instant case.[11]

Consequently, the characteristic in broadcasting that justifies increased governmental intrusion in that medium is absent in the instant case.

B. *Natural Monopoly as a Justification*

Most of the argument on the instant motion centered around whether the natural monopoly or economic scarcity rationale justified a greater degree of government regulation than allowed in a newspaper context. Although the Ninth Circuit in *Preferred I* briefly commented "[i]n passing" on the natural monopoly argument, it did not decide

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[11]The defendants made no significant argument in favor of the physical scarcity in their briefs, and their lead counsel admitted at oral argument that none in fact existed in this case. Tr. at 21:21-22.

the issue because the court accepted as true plaintiff Preferred's allegation on the economic feasibility of competition for cable services in the Los Angeles area. *Id.* The court seemed to imply, however, that a natural monopoly would not be a justification for exclusive franchising. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 716 (8th Cir. 1986) (interpreting the Ninth Circuit's decision as implying this conclusion).

In the instant case, the issue must be confronted because the parties have hotly contested the question of whether the CTV market in the proposed service areas is a natural monopoly. The Cities envision a trial on this economic question, with both sides presenting expert testimony, based upon studies and statistics, opining on the likelihood that the relevant market is a natural monopoly. According to the defendants, if the trier of fact finds that there is a reasonable likelihood that the market is a natural monopoly, then the Cities should be able to institute their franchising scheme.

Before determining whether there is a triable issue of fact on the question, however, this Court must first decide whether the question is material under applicable substantive law. Defendants concede that if this Court decides that the law applicable to newspapers controls in this case, then the natural monopoly issue is immaterial and cannot defeat plaintiff's motion.

The Cities' argument on the materiality of the natural monopoly rationale is basically as follows: because the CTV market in our service area is a natural monopoly, it shares a characteristic analogous to the physical scarcity trait in the broadcasting medium, which results in an in-

herent limitation on the number of possible speakers. Such a trait warrants government regulation of the number and identity of the speakers, which ensures the enhancement of first amendment values.

The Supreme Court rejected this economic scarcity rationale in the context of newspapers, however, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In striking down a Florida statute that required newspapers to print replies of persons subjected to editorials that assailed their character, the Court rejected the suggestion that purely economic constraints on the number of newspaper voices available in the given community justified otherwise unwarranted intrusions into first amendment rights. *Id.* at 247-56. This Court is convinced that the first amendment mandates the same conclusion in the instant case.

This Court recognizes that newspapers, the most traditional form of the media, are historically the source of most of the debate on politics and government that lies at the core of first amendment values. *Id.* at 257-58. Yet, just as a "newspaper is more than a passive receptacle or conduit for news, comment, and advertising," *id.* at 258, the Supreme Court has stated that cable operators exercise a "significant amount of editorial discretion regarding what their programming will include." *Preferred II*, 106 S.Ct. at 2037 (quoting *Federal Communications Commission v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979)); *see also Preferred I*, 754 F.2d at 1410 n.10 (recognizing that although CTV operators do transmit programs produced by others, they do exercise considerable editorial discretion). Although the Supreme Court stopped just

short of equating cable television to more traditional forms of the media, *see Preferred II*, 106 S. Ct. at 2037, the D.C. Circuit has concluded that there is no "meaningful 'distinction between cable television and newspapers.'" *Quincy*, 768 F.2d at 1450 (quoting *Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9, 46 (D.C. Cir. 1977)). This Court agrees that "the analogy [of cable television] to more traditional media is compelling." *Quincy*, 768 F.2d at 1450.[12]

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[12]The *Quincy* court noted the findings of two influential commissions that have reached the same conclusion, quoting one as finding that "[c]able television, by freeing television from the limitations of radiated electro-magnetic waves, creates . . . a situation more nearly analogous to that of the [print] press." 768 F.2d at 1450 (quoting SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE 92 (1971)).

Once we get beyond the difference in the burden to the public domain, the Court finds no constitutionally significant distinction between the content and form of the messages delivered by the CTV medium and newspapers. A CTV operator communicates nearly the same variety of information as the *New York Times*, including general news and political commentary on local, state, national, and international issues, religious programming, and entertainment and educational shows. Although most cable programming today is not originated by CTV operators, they exercise the same editorial discretion as the newspaper editors who decide which nationally syndicated columnists to publish. Certainly, a newspaper would not receive less first amendment protection because it published only syndicated columnists and wire stories. Finally, the very RFP at issue in this case evidences a trend toward greater operator involvement in original programming, listing "operator-originated programming" as one of the five types of services that a potential franchisee must be capable of providing. The RFP envisions the franchisee as supplying a fully-equipped broadcast studio and two to three small-scale mobile production units to facilitate the operator's own (and other community-based) programming.

Not all Circuits have agreed with the D.C. Circuit's conclusion that the reasoning in *Miami Herald* applies to render the natural monopoly rationale irrelevant in the cable television context. *Quincy*, 768 F.2d at 1450; *Home Box Office*, 567 F.2d at 46. Defendants cite the Seventh, Eighth, and Tenth Circuits in support of their position that the existence of a natural monopoly is a basis for the limitations on access that the Cities seek to impose. *Central Telecommunications, Inc. v. TCI Cabletelevision, Inc.*, 800 F.2d 711 (8th Cir. 1986); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982). This Court finds these decisions unpersuasive, however, because each lacks a thorough analysis on the relationship between the proposed regulation and the characteristics of the CTV medium, which analysis we believe is now mandated. *See Preferred II*, 106 S. Ct. at 2038.

The most extended discussion of the issue was that of the Tenth Circuit in *Community Communications*, 660 F.2d at 1376-79. The Tenth Circuit distinguished *Miami Herald* by tying the natural monopoly characteristics of the CTV medium to the burden a cable system causes on public utility facilities and streets. Noting that the economic scarcity in *Miami Herald* was "unrelated to the disruptive use of the public domain requiring a government license," *id.* at 1379, the court found that, in contrast, a CTV operator "must significantly impact the public domain in order to operate; without a license, it cannot engage in cable broadcasting to disseminate information." *Id.*

The weakness in the Tenth Circuit's reasoning stems from the lack of a link between a distinctive characteristic of cable television, e.g., the disruption to the public domain, and the proposed government regulation. The fact that a CTV system can potentially disrupt the streets might justify certain government regulations aimed at minimizing such disruption. As the Ninth Circuit noted, however, "[the Tenth Circuit's] statement is too broad. It suggests that simply because cable's disruption of the public domain gives rise to a need for licensing, it would also justify the monopoly the City seeks to create by its auction process." *Preferred I*, 754 F.2d at 1405.

The Seventh Circuit's opinion in *Omega* is similarly unpersuasive. The court acknowledged that "while today most newspaper markets are natural monopolies, no one thinks that entry into those markets could be regulated without creating profound First Amendment problems." *Omega*, 694 F.2d at 128. Nevertheless, the court summarily concluded that the "apparent natural monopoly characteristics of cable television provide . . . an argument for regulation of entry." *Id.* at 127-28. The opinion was devoid of any reason why such a characteristic should make any difference in the cable television setting when it does not in the newspaper context.[13] Indeed, the court did not appear to take a definitive stand on the issue, citing the Tenth Circuit in *Community Communications* and con-

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[13]Other than the natural monopoly theory, the court also briefly noted the public disruption argument, *Omega*, 694 F.2d at 127, and the fact that television in general enjoys "universal access to the home," which results in a "felt need to protect children." *Id.* at 128. Again, the court did not link these characteristics to the regulation of the entry of CTV operators.

cluding only that "[p]robably there are enough differences between cable television and the nontelevision media to allow more government regulation of the former." *Id.* at 128.

Finally, while this motion was under submission, the Cities cited to this Court the recent Eighth Circuit decision in *Central Communications*, 800 F.2d 711. That case involved an existing franchised CTV operator's effort to prevent the city from granting a new exclusive franchise to a competing company. The Eighth Circuit held that the natural monopoly characteristics of defendant city's cable market justified the city's granting of a de facto exclusive franchise to a single CTV operator. *Id.* at 717. After reviewing the Supreme Court's *Preferred II* opinion,[14] the court cited and discussed the *Community Communications* and *Omega* decisions in support of the proposition that cable television is more analogous to broadcasting than newspapers, therefore justifying an ex-

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[14]The Eighth Circuit read the Supreme Court's opinion as "suggest[ing] that the cable medium may be distinguished from the newspaper medium and that more government regulation of a cable medium may be permissible because cable requires use of public ways and installation of cable systems may disrupt public order." *Central Telecommunications*, 800 F.2d at 714. This Court reads *Preferred II* as definitely holding only that the CTV medium may be distinguishable from the newspaper medium *because* of the greater disruption to the public domain that can result with the former. The Supreme Court in fact did not suggest that the fact that cable television might disrupt public resources somehow justifies government regulation unrelated to this characteristic.

clusive franchising scheme.[15] Although "recogniz[ing] that there are profound first amendment implications inherent in the regulation of cable operators," *id.* at 716, the Eighth Circuit similarly failed to explain why a CTV operator should receive less first amendment protection than a newspaper. Cautioning that it would not decide any question not squarely before it, the court considered the natural monopoly question "only in terms of the competing technologies offered" by the two competing CTV operators in the case. *Id.* 716-17. The court then noted that the defendant cable company proposed to provide a more technologically advanced system with far more channels at a lower cost than plaintiff was currently providing. *Id.* at 717. Therefore, although plaintiff had "a first amendment interest in remaining as a cable television 'speaker'," defendant's "proposal went further in advancing the first

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[15]The Eighth Circuit's opinion lacks any discussion of the D.C. Circuit's clear position to the contrary enunciated in *Home Box Office*, 567 F.2d 9, and *Quincy*, 768 F.2d 1434. In fact, *Central Telecommunications* incorrectly implies that the D.C. Circuit's position is in accordance with the Seventh and Tenth Circuits. The court cites Tele-communications of Key West v. United States, 757 F.2d 1330 (D.C. Cir. 1985), as support for the proposition that "[t]he apparent natural monopoly characteristics of cable television . . . provide an argument for regulation of entry." *Central Telecommunications*, 800 F.2d at 716 (quoting *Omega*, 694 F.2d at 126-27). In fact, the issue of natural monopoly was never raised in the *Key West* opinion. In a parenthetical, the Eighth Circuit characterizes the *Key West* decision as "[h]olding that if cable company could show that there were no practical reasons why two cable operators could not serve Air Force base, Air Force's exclusive franchising scheme would violate the first amendment." *Id.* at 716 (citing *Key West*, 757 F.2d at 1338). This Court reads "practical reasons" as referring to circumstances such as the physical burden on the Air Force base, not to market conditions. *See Key West*, 757 F.2d at 1335-36.

amendment interests of the viewing public in the greatest variety of programming obtainable." *Id.*

Like the Seventh and Tenth Circuits, the Eighth Circuit did not explain which characteristics of the CTV medium justify application of less protection than afforded to the nonbroadcasting media. Clearly, the first amendment will not tolerate the government's suppression of speakers, even on a content-neutral basis, in the newspaper, movie, and book industries on the ground that the one speaker granted access provides the greatest variety of articles, movies or publications at the lowest price. It is also clear under *Miami Herald* that the fact that the newspaper, movie or book markets in a given community are a natural monopoly does not justify greater governmental regulation of such first amendment speakers.

In an age when most people receive their daily news via the television, that medium has established a role as critical to the free flow of ideas and information in this society as any of the more traditional media. The physical scarcity that justified the government's unparalleled intrusion into the broadcasting medium simply does not exist in this case. The Supreme Court has always stressed that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it . . . ." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). As a result, a particular characteristic of a given form of expression can only justify government regulation aimed at addressing that particular characteristic. Although the fact that cable television places a heavier burden on the public domain than more traditional forms of the media may justify some government

regulation of that burden, the defendant Cities as a matter of law have failed to persuade this Court that there are any other differences attributable to cable television that can justify a degree of first amendment protection similar to that applied to the broadcast medium.

IV. *Application of the O'Brien Test*

Concluding that the allowable degree of governmental regulation is not fixed by physical or economic scarcity does not mean that all regulation of CTV operators is invalid. *Preferred I*, 754 F.2d 1396, 1405 (9th Cir. 1985), *aff'd*, 106 S. Ct. 2034 (1986). The first amendment allows some government regulations of noncommuncative aspects of speech. *Id.* As the Supreme Court has noted, "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *Preferred II*, 106 S. Ct. 2034, 2038 (1986) (citing *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805-07 (1984); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)).

The propriety of governmental regulations of non-communicative aspects of speech is judged by the standard enunciated in *United States v. O'Brien*, 391 U.S. 367.[16]

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[16]The parties disagreed as to what the appropriate test should be in this case. The Court notes, however, that *O'Brien* was applied by the Ninth Circuit in *Preferred I*, 754 F.2d at 1405-07, and cited by the Supreme Court in *Preferred II*, 106 S. Ct. at 2038. Additionally, plaintiff argued that the *O'Brien* test was inappropriate because the RFP process was not content-neutral. We hold for the purposes of this motion only that the regulation at issue is applied in content-neutral fashion, but note the Ninth Circuit's finding that "allowing only a single company

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Under the *O'Brien* test, a regulation is constitutional only if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on first amendment freedom is no greater than essential to further that interest. *O'Brien*, 391 U.S. at 377. The defendant Cities bear the burden of proving that the elements of this test are satisfied. *Preferred I*, 754 F.2d at 1406 n. 9; *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 535 (9th Cir. 1984), *rev'd on other grounds*, 106 S. Ct. 925 (1986).

To reiterate, the only government regulation addressed on this motion is that part of the Cities' franchising process that limits to one the number of CTV operators given access to the facilities necessary to install a cable system.

As to the first step of the *O'Brien* test, this Court finds that, as a matter of law, a franchise arrangement is within the Cities' constitutional power of government.[17] Because the second step, whether the regulation furthers

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selected through the franchise process to erect and operate a cable system in the region . . . creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or views expressed in, their proposed programs." *Preferred I*, 754 F.2d at 1406. This in fact appears to be the basis upon which the Ninth Circuit found that the *O'Brien* test was not met. *See id.* at 1406-07.

[17]California Government Code section 53066 expresses a clear legislative intent on the part of the California legislature to delegate government regu[la]tion over CTV operators to local governments. *Preferred I*, 754 F.2d at 1413.

an important ~~or substantial~~ governmental interest, is determinative on ~~the~~ instant motion, the Court finds it unnecessary to reach a decision on whether there are genuine issues of material fact under the third and fourth steps.

As noted earlier, the Cities have alleged five interests to satisfy the second step of the *O'Brien* test: (1) minimizing disruption of the public domain; (2) promoting first amendment values by ensuring that their residents receive CTV service from that operator who will provide the most reliable and highest quality service; (3) preventing "cream skimming," which is the wiring of only affluent, and therefore more profitable, portions of the franchise area; (4) ensuring community and commercially-leased access channels; and (5) encouraging the development of state-of-the-art cable systems with adequate channel capacity. This Court finds as a matter of law that, of these five interests, only the facts underlying the first, disruption to the public domain, are material so as to warrant consideration on this summary judgment motion. As to the last four, none state an important or substantial governmental interest that would justify the severe impact on the first amendment rights of all potential CTV operators except the one given access.[18] It is to

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[18]In applying the second step of the *O'Brien* test, the Supreme Court applies a balancing test, asking whether the alleged governmental interest is sufficiently substantial to justify the resultant impact on free expression. *See, e.g.*, Members of the City Council v. Taxpayers for Vincent, 104 S. Ct. 2118, 2129 (1984).

The Cities argued these same alleged interests in their amicus brief to the Ninth Circuit in *Preferred I*, to which the court responded in a footnote: "We are not convinced that

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these last four alleged interests that the Court will first turn.

These four interests are inherently related to the natural monopoly rationale. Essentially, the Cities argue that if there is a reasonable probability that their service area will economically support only one CTV operator, then they should be able to choose, at the outset, that operator who will provide the highest quality service and use the offer of an exclusive franchise as a plum to bargain for certain concessions, e.g., access channels, that they might not be able to acquire if an operator knew that it would have to compete with other cable providers. The existence of a state-of-the-art CTV operator that provides quality service, including community and commercial access channels, to all areas within their boundaries best ensures, the Cities argue, that the values of the first amendment will be furthered because the Cities' residents will have expanded opportunities to receive diverse sources of information.

The Cities' position is analogous to one taken by municipalities defending antitrust suits by cable operators. They have argued, as cities have successfully done with such industries as water and electricity, that regulation of natural monopolies maximizes economic efficiency, and consequently, consumer welfare. Judge Posner of the Seventh Circuit explains this reasoning in the CTV setting:

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restricting the number of cable operators in the manner set forth in . . . [Preferred's] complaint furthers these interests in a manner consistent with the First Amendment." 754 F.2d at 1406 n 9.

> "[I]n a 'natural monopoly' . . . the benefits, and indeed the very possibility, of competition are limited. You start with a competitive free-for-all . . . but eventually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs. In the interim there may be wasteful duplication of facilities. This duplication may lead not only to higher prices to cable television subscribers, at least in the short run, but also to higher costs to other users of the public ways. . . . An alternative procedure is to pick the most efficient competitor at the outset, give him a monopoly, and extract from him in exchange a commitment to provide reasonable service at reasonable rates."

Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982).

The Cities essentially argue that the same is true in the context of the first amendment. Just as the regulation of water and electric companies—or CTV operators as the case may be—enhances consumer welfare through economic efficiency, the regulation of CTV operators furthers the purposes of the first amendment. But in this case, what may foster economic efficiency most certainly inhibits the first amendment.

The paternalistic role in the first amendment that the Cities envision for government is simply inconsistent with the purpose and goals of the first amendment. The Cities nevertheless contend that such a role is consistent

with the Supreme Court's often-cited passage that, under the first amendment, it is the rights of viewers and listeners that is paramount, not the rights of speakers. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 390 (1969). We disagree. In fact, the rationale of the Court is just the opposite. The Court proceeds to explain in *Red Lion* that because the viewers' rights are paramount, "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market . . . ." *Red Lion*, 395 U.S. at 390. Elsewhere, the Court has explained that the Constitution "command[s] that government itself shall not impede the free flow of ideas . . . ." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 252 (1974) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). We reach our conclusion with the first amendment interests of the Cities' residents foremost in mind, for their rights are endangered by a governmental attitude that government knows best how to fine tune the flow of information to which they have access. Furthermore, this Court agrees with the Ninth Circuit in *Preferred I* that such governmental intrusion carries with it the inherent risk of covert discrimination against certain CTV operators. *See supra* note 16.

Consequently, the factual questions presented by the Cities on the above four alleged interests are immaterial

under the applicable substantive law, and therefore, cannot give rise to issues of fact that can defeat plaintiff's motion for summary judgment.

The analysis is different, however, on the Cities' first alleged interest, disruption to the public domain. In *Preferred I*, the Ninth Circuit recognized that a "City has legitimate interests in public safety and in maintaining public thoroughfares." *Preferred I*, 754 F.2d at 1406; *see also Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982) ("A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur.") Additionally, the fact that a cable system burdens public resources is a characteristic of the medium not shared with traditional media such as newspapers. Therefore, even when applying to CTV operators the same first amendment standard applied to newspapers, the allowable governmental regulation must still be viewed in light of those important or substantial governmental interests specifically implicated by the noncommunicative aspects of the CTV medium.

The above finding that, under the applicable substantive law, the Cities have an important or substantial governmental interest in minimizing disruption to the public domain does not end the inquiry. For purposes of this motion the Court next must determine whether the Cities have offered sufficient evidence to create a gen[ui]ne issue of fact on the question of whether the proposed limitation

on access "furthers" that governmental interest. *See O'Brien*, 391 U.S. at 377 (the second step is whether the challenged regulation "furthers" an important or substantial governmental interest). That is, have the Cities offered sufficient evidence on the degree of disruption that will result if they initially allow more than one CTV operator to lay cables?

Both sides presented exhaustive evidence on the disruption that results from the installation and maintenance of cable systems, which run underground and on telephone poles. The Cities presented declarations from their experts on everything from the danger posed to other cable lines to the likely increase in the number of complaints the Cities will receive regarding remiss CTV workers who leave backyard gates open for opportunistic family pets.[19]

The Cities made no showing, however, on how much more disruptive granting access to more than one CTV system would be when multiple systems are installed simultaneously as opposed to the installation of a single system. What is at issue here is a facial challenge to a franchising scheme that grants access to the first CTV operator to lay cables within a particular service area. Consequently, the Cities cannot justify a limitation to one on

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[19]For example, the Cities submit expert declarations stating that the trenching necessary to install a cable system underground carries with it such risks as damaging other utilities services, destroying the physical integrity of the road surface in which trenching is performed, injuring vehicles using the streets, delaying resurfacing of the Cities' roadways, adversely impacting local business, interfering with vehicular, pedestrian, and bicycle traffic, and damaging or obstructing property. Defendants Palo Alto and Atherton's Memorandum in Opposition, pp. 17-18 n.17.

the ground that, in general, a CTV system is disruptive to the public domain. The Cities are willing to allow the installation of the first system. The question must then become: how is the government's interest in the public domain effected if access is granted initially to more than one system? To this, the Cities provide no answer.

The Cities address this issue only by arguing that unless two or more CTV systems are installed simultaneously, the disruptive burden will be increased whenever more than one system is constructed within the same service area. *See* Defendants Palo Alto and Atherton's Memorandum in Opposition, pp. 17-18. This may be so. But such a contention is incongruous to the facts of this case because when the RFP was issued no cables had previously been installed, the Cities intended to allow installation of one system, and simultaneous installation of multiple systems was possible. This is not a case in which one system has already been fully installed and another CTV operator subsequently seeks to install another system over the same public domain. If disruption can be minimized by simultaneous installation, then what prevents the Cities from taking advantage of that fact with proper time, place, and manner restrictions? Indeed, plaintiff has stated that requiring simultaneous installation would be a valid government regulation. *See* Plaintiff's Reply Memorandum, pp. 13-14.[20]

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[20]We do not express an opinion on the issue of whether the public disruption interest could ever justify the total ban on a particular CTV operator's installation of any of its own cables, but the Ninth Circuit's *Preferred I* opinion seems to suggest that it could not. 754 F.2d at 1406.

Because the Cities have made no showing that initially allowing access to more than one operator will implicate or "further" their important or substantial interest in regulating disruption to the public domain, this Court finds that, as a matter of law, there are no genuine issues of material facts under the second step of the *O'Brien* test.

V. *Conclusion*

We have not intended to suggest in this decision, nor do we read the Ninth Circuit's *Preferred I* opinion as holding, that the Cities necessarily have to open their cable facilities to all comers regardless of size, shape, quality or qualifications. *Accord Pacific West Cable Co. v. City of Sacramento*, No. 85-2143, slip op. at 6 (9th Cir. Aug. 20, 1986). We have not needed to reach the issue of permissible minimum requirements that the Cities might impose on all franchisees. This Court only holds on this motion that the Cities have not offered sufficient evidence to create a genuine issue of material fact on the question of whether there is a substantial or important governmental interest to justify limiting to one the number of CTV operators granted access to the facilities necessary for the installation and maintenance of a cable system. Therefore, under the undisputed facts of this case, that part of the Cities' RFP that imposes such a restriction is unconstitutional on its face.

According to the Cities, their entire franchising scheme depended upon limiting initial access to one CTV operator. Therefore, the Court is now unsure as to what, if any, issues in this case are still unresolved other than

damages. Accordingly, the Court orders that a status conference in this case be held at 3:30 p.m. on February 4, 1987. The Court further orders that three weeks prior to that date, plaintiff file a status conference statement listing the remaining issues in this case. One week thereafter, the defendant is to file its version of the same status conference statement.

IT IS SO ORDERED.

DATED: December 3, 1986.

/s/ .....
EUGENE F. LYNCH
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., a California corporation, Plaintiff, vs. CITY OF PALO ALTO, CALIFORNIA, a municipal corporation; CITY OF PALO ALTO UTILITIES, a municipal utility; CITY OF MENLO PARK, CALIFORNIA, a municipal corporation; and TOWN OF ATHERTON, CALIFORNIA, a municipal corporation, Defendants.	NO. C-83-4231 EFL OPINION AND ORDER (Filed February 15, 1984)

This matter is before the Court on the defendants' motion to dismiss the complaint. The plaintiff asserts antitrust and First Amendment claims as well as a state free expression claim and state law claims for interference with a right to use dedicated utility poles. Upon considering the briefs and argument of counsel, the Court hereby grants defendants' motion to dismiss as to the antitrust claims and denies the motion as to the free expression and dedication claims.[1]

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[1] The parties do not assert any differences between plaintiff's First Amendment rights and its rights under Article I, Section 2 of the California Constitution; the Court will therefore discuss both claims in First Amendment terms only.

I. FACTS[2]

The plaintiff is an aspiring cable television (hereinafter "CTV") operator. The defendants (hereinafter "the Cities") are three municipalities and a utility company owned by one of the Cities. Plaintiff attempted to enter the CTV business in each of the Cities but was refused a business license and was told that it must participate in a franchisee selection process conducted by the City of Palo Alto on behalf of all of the Cities. Plaintiff also sought permission to use utility poles owned by the Pacific Telephone and Telegraph Company, the Pacific Gas and Electric Company, and the defendant City of Palo Alto Utilities, but was refused "pole attachment services" because it had no CTV operating franchise. Although plaintiff alleges that Pacific Telephone and Telegraph Company and the Pacific Gas and Electric Company are in conspiracy with the defendants, plaintiff has neither developed this allegation nor sued the two companies.

The franchise selection process conducted by the Cities has two parts. First, the Cities issued a Request for Proposals (hereinafter "RFP"). This document specifies the minimum requirements that an applicant must meet in order to be considered for a franchise.[3] The RFP

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[2] For purposes of this motion to dismiss, the Court, of course, accepts the plaintiff's allegations as true.

[3] Such minimum requirements include

a. payment of a $5000 filing fee,

b. reimbursement of the Cities for all actual expenses of the franchising process,

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also requests certain technical, construction, ownership, and financial information concerning the applicant and its proposed system. The Cities will then evaluate the applicants in a number of categories including services and rates, technical/construction, financial, local commitment, and ownership/structure.

The second phase of the selection process involves negotiations with one or more of the most qualified applicants. The Cities may award franchises to one or to several bidders, as they see fit, or they may negotiate for municipal participation in the ownership of the system.

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c. contribution of approximately $200,000 as a "start-up" endowment (plus a "modest" annual contribution) for local access organization,

d. payment of a percentage of the franchisee's gross revenues,

e. provision of the full range of service categories made possible through state-of-the-art cable technology, including interactive (two-way) service,

f. provision of at least 108 channels and three parallel cable systems,

g. provision of free basic service and receiving equipment for each public building,

h. provision of "an appropriate percentage of the bandwidth" of an "institutional cable" for free use by governmental and other public institutions,

i. contributions of facilities (including mobile production units), equipment, staff, and training to aid the public in producing "local access programming,"

j. provision of an "appropriate number of channels on the subscriber cable" for local access programming, and

k. the waiver of any rights created by law that are contrary to or inconsistent with the RFP or the franchise agreement

Plaintiff alleges that this second phase is designed to wring further concessions out of the remaining applicants.

Rather than participate in the franchising process, plaintiff brought this lawsuit, which challenges not just particular aspects of the process, but the very concept of municipal CTV franchising. Plaintiff seeks damages as well as declaratory and injunctive relief. Plaintiff argues that it has a First Amendment right to be a CTV operator and that the franchising process impermissibly burdens that right; plaintiff also argues that the franchising process is anticompetitive and that market forces, not municipal governments, should decide who can set up a CTV system.

II. THE ANTITRUST CLAIMS

The Cities assert that their franchising process is protected from antitrust scrutiny under the state action doctrine first applied in *Parker v. Brown*, 317 U.S. 341 (1943). The Cities also argue that their conduct constitutes neither a Sherman Act section 2 violation nor a section 1 conspiracy, that the issues are not ripe, and that plaintiff lacks constitutional and antitrust standing. As we conclude that defendants' conduct is protected as state action, we do not reach their substantive antitrust arguments.[4]

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[4] Defendants' ripeness and constitutional standing arguments lack merit for the reasons discussed in Part III.A. of this opinion. Defendants' antitrust standing argument is also unavailing. *Solinger v. A & M Records*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979), makes clear that preparedness to enter the market is a factual issue. *Id.*

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A. The State Action Exemption—Preliminary Considerations

The state action "exemption" is a doctrine of federalism;[5] it is premised on the proposition that a state should be free to replace competition with regulation or public ownership without incurring antitrust liability. In *Parker*, the plaintiffs challenged a California statute under which state officials maintained prices and restricted competition among raisin growers. The Supreme Court found that the program was not subject to the antitrust laws because "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers from activities directed by its legislature." *Id.* at 50-51. The Court emphasized the sovereignty of the states and refused to infer that Congress intended to nullify a state's control over its officers and agents.

A city, however, is not a sovereign body and cannot be the *source* of a *Parker* exemption. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978)

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at 1309-10. The *Solinger* court noted that this issue seldom presents a situation appropriate for *summary judgment*. *Id.* at 1310. On this *motion to dismiss*, the Court certainly cannot reject plaintiff's allegations that it is prepared to enter the market.

[5] The state action doctrine does not truly "exempt" or "immunize" conduct from the coverage of the antitrust laws; rather, it rests on a construction of the Sherman Act that places certain activities beyond the reach of the statute.

(plurality opinion of Brennan, J.).[6] *City of Lafayette* involved a challenge to allegedly anticompetitive conduct by two municipal utilities. In affirming remand of the case, the Court stated that the conduct of the cities would be exempt only if engaged in pursuant to state policy to displace competition with regulation or monopoly public service. Moreover, the test of the adequacy of the state mandate for anticompetitive conduct by the city is not whether the city can point to a specific, detailed legislative authorization, but whether it is shown "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.* at 415.

In *California Liquor Dealers' Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court crystallized a two-part test from its earlier opinions in *City of Lafayette* and *Bates v. Arizona State Bar*, 433 U.S. 350 (1977). "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself." *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette*, 435 U.S. at 410 (plurality opinion of Brennan, J.)). *Midcal* involved California's statutory plan for wine pricing, which required the filing of fair trade contracts or price schedules with the state. Wholesalers who de-

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[6] This proposition commanded a clear majority of the Court in *Community Communications Corp. v. City of Boulder*, 455 U.S. 40 (1982); it should be noted, however, that *City of Boulder* concerned only injunctive relief. *See City of Lafayette*, 435 U.S. at 441-43 (1978) (dissenting opinion of Blackmun, J.); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 614 n.6 (1976) (opinion of Blackmun, J., concurring in the judgment).

parted from the listed prices were penalized by the state. The program passed the first part of the test because it was embodied in a statute. However, the program was impaled on the second prong, requiring active supervision by the state, because the state did not establish or review the price schedules themselves.

The crucial issues in the instant case concern the interpretation and application of the *Midcal* test to allegedly anticompetitive conduct *by a municipality*. First, is the clear articulation part of the *Midcal* test satisfied when the state *authorizes* a municipality to act anticompetitively, or must the state *compel* such anticompetitive action? Second, does the active supervision part of the *Midcal* test apply at all when the challenged activity is conducted by a municipality rather than by private parties?

B. *Midcal's* "Clear Articulation" Test

1. California's Statutory Scheme

The Court finds that sections 53066 and 53066.1 of the California Government Code *authorize* franchising such as that conducted by the Cities despite any anticompetitive effects.[7] Those statutes do not, however, require

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[7] Section 53066, which was enacted in 1963 and amended in 1968, provides, in pertinent part, as follows:

> Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city,

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or compel such allegedly anticompetitive procedures. The plain language of section 53066 is thoroughly permissive; a city may, under a local public interest standard, award a franchise to any one party or to many parties, and it may consider any relevant factor. Plaintiff contends that the Cities must give a franchise or license to any party seeking one; the statute does not require a city to do this or in any other way to safeguard free competition.

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> county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid.

Section 53066.1 was enacted in 1979 and was amended twice in 1982; it permits a CTV operator to escape municipal *rate* regulation if it meets certain criteria. It does not deregulate or in any way relate to franchising. Moreover, subsection (p) states as follows:

> While the development and the regulation of cable television is a matter of statewide concern, the Legislature finds and directs that the exercise of the police power of the State of California concerning cable television should, except as otherwise directed by the Legislature, remain in the cities, counties, or cities and counties; and that the cable television companies and the cities, counties, or cities and counties should remain able, subject to the proper limits of that police power, to contract one with the other pursuant to the ordinary rules of, and subject to the ordinary remedies of contract law; except that henceforth neither a cable television system nor a franchisor shall be entitled, with respect to any franchise agreement awarded or renewed on or after the effective date of amendments to this section enacted by the Statutes of 1982, to raise the defense of impairment of contract, in any case where the due and proper exercise of the police power, or the limits thereof, is at issue, and a provision to this effect shall be deemed to be incorporated in any such franchise agreements.

Indeed, the word "franchise" connotes a certain degree of exclusivity, and the right of a city to *deny* a franchise was necessarily upheld in *Monarch Cablevision, Inc. v. City Council of Pacific Grove*, 239 Cal. App. 2d 206, 48 Cal. Rptr. 550 (1966).

At oral argument, plaintiff contended that despite the plain language of section 53066, the California legislature did not delegate franchising authority *with an intent to displace competition*. After reviewing the lengthy excerpts of legislative history presented by the parties, the Court concludes that the legislature did intend to displace competition when it enacted section 53066.

It is true that the legislative history never refers specifically to the displacement of competition. Nevertheless, the legislature must have considered that granting municipalities the authority to award franchises on virtually any basis that they deem advisable would necessarily displace the competitive free-for-all argued for by the plaintiff. Indeed, one purpose of the bill was to make it clear that a city was not required to award a franchise to the highest bidder. Danielson and Wheeler, *The Status of the Cable Antenna Television Industry in California and a Proposal for State Regulation*, 2 Pacific L.J. 528, 551-54 (1971). Moreover, the enactment of section 53066.1 was a step toward competition in CTV ratesetting; this was necessary because rates had been regulated under section 53066. Yet section 53066.1 deregulated nothing but CTV rates, and the legislature did so because it felt that competition *from non-cable sources* would keep CTV rates in check. California Office of Planning and Research, Enrolled Bill Report: AB 699 at 3 (Sept. 20, 1979). The Court finds nothing in the legislative history that contra-

dicts the plain language of the statute, and the Court concludes that California's municipalities *may*, but are not required to, franchise in a way such that some potential CTV operators are excluded from the local market.

2. Compulsion Versus Authorization

In *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), the Supreme Court held that CTV regulation by a home rule city was not exempt as state action because, in the absence of "an affirmative addressing of the subject by the State," the state's position was "one of mere *neutrality*." *Id.* at 55. Plaintiff argues that state compulsion must be required in this case because mere authorization is equivalent to the neutrality found in *City of Boulder*. Where each municipality is free to choose between competition, regulation, and municipal ownership, plaintiff argues, the legislature cannot be held to have "contemplated" each approach.

The Court disagrees. This case is unlike *City of Boulder* because here the legislature has *affirmatively* addressed the subject. *See, e.g., Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1013 (8th Cir. 1983), *appeal pending*. Section 53066 gives municipalities the power to award a franchise (or franchises[8]) "on the basis of quality of service, rates to the subscriber, income to the city . . ., experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash

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[8] The term "franchise" includes the plural form "franchises." Cal. Gov't Code § 13.

auction bid."[9] Thus, it can be said, "from the authority given [the Cities] to [franchise CTV] that the legislature contemplated the kind of action complained of." *City of Lafayette*, 435 U.S. at 415 (plurality opinion of Brennan, J.). This interpretation of *City of Lafayette* and *City of Boulder* is further supported by the fact that the language of both cases refers to whether the state "directed or authorized" the action complained of. *City of Lafayette*, 435 U.S. at 414, 416, 417; *City of Boulder*, 455 U.S. at 57.

State and local governments would be in a difficult bind were authorization to displace competition insufficient to invoke the state action immunity. In some areas, a state may decide that proper use of the delegated powers requires wide discretion and flexibility at the local level. *Cf. City of Lafayette*, 435 U.S. at 416; Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 445 n.49 (1981). In fact, the clearest articulation and the most affirmative expression of state policy in this area is contained in California Government Code section 53066.1(p), which reaffirms as follows the authority granted by section 53066: "the Legislature finds and directs that the exercise of the police power of the State of California concerning cable television should, except as otherwise directed by the Legislature, remain in the cities, counties, or cities and counties . . . ." The position of the State of California is that choices involving

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[9] Section 9-506 of the Arizona Revised Statutes contains no similar provision. Arizona did not affirmatively address the issue of municipal CTV regulation with the specificity that has been done here. This case is thus distinguishable from *Catalina Cablevision Assoc. v. City of Tucson*, No. 82-459 (D. Ariz. July 2, 1983).

CTV regulation are best made at the local level. When problems arise with local regulation, the state will step in to correct them, as it did in 1979 by deregulating some CTV rates under section 53066.1. A state should not be *forced* to choose, on behalf of each municipality, between free competition, regulation, and municipal ownership.

The Seventh and Eighth Circuits have squarely faced the compulsion versus authorization question and have clearly held that state authorization (with an intent to displace competition) is sufficient to confer state action immunity upon a municipality. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983) (municipal monopolization of markets for sewage collection, transportation, and treatment), *appeal pending; Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983) (single-operator ambulance system), *appeal pending; see also Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 429 (8th Cir. 1983) (municipal monopolization of solid waste disposal services). Two other circuits have, in less explicit terms, immunized municipal action that was authorized, though not compelled, by the state. *City of North Olmstead v. Greater Cleveland Regional Transit Authority*, No. 82-3135 (6th Cir. Dec. 2, 1983) (municipal monopolization of regional public transportation); *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982) (municipal regulation of aircraft services), *cert. denied*, — U.S. —, 103 S. Ct. 762 (1983). In addition, a number of district courts have opted for the authorization standard. *E.g., Springs Ambulance Service v. City of Rancho Mirage*, 1983-2 Trade Cas. (CCH) ¶ 65, 646 (C.D. Cal. Sept. 27, 1983) (municipal monopolization of emergency ambulance services); *Golden State Transit*

Corp. v. City of Los Angeles, 563 F. Supp. 169 (C.D. Cal. 1983) (municipal regulation of taxicab services; court noted that such regulation was "traditionally local"); *Hybud Equipment Corp. v. City of Akron*, 1983-1 Trade Cas. (CCH) ¶ 65 356 (N.D. Ohio April 6, 1983) (municipal monopolization of solid waste disposal services); *see Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982) (award of cable TV-franchise; cable TV was, however, a "public utility" under state law).

The Court recognizes that interpreting the *Mideal* test to require only authorization (with intent to displace competition) for municipal action is not without problems. Current Supreme Court precedents appear to require compulsion where *non-municipal* governmental agencies such as state bar committees are concerned. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977). The Ninth Circuit has followed this interpretation in *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 696 (9th Cir. 1982), *cert. granted sub nom. Hoover v. Ronwin*, 103 S. Ct. 2084 (1983).

In neither *City of Lafayette* nor *City of Boulder* did the Supreme Court articulate a distinction between municipalities and other non-sovereign governmental bodies. Nevertheless, this Court finds the language of *City of Lafayette* to be irreconcilable with the compulsion test used in *Goldfarb* and *Bates*. We believe that such a distinction can be drawn, at least where the political accountability of municipal officials can serve to check governmental excesses.

The Supreme Court warned in *City of Lafayette*, 435 U.S. at 406-08 (plurality opinion of Brennan, J.), that

cities may often pursue their own parochial interests and that municipal actions may affect persons who lack political recourse because they live outside the municipality. As the instant case involves no such effects, the local interests of the Cities will not be served at the expense of surrounding municipalities. Moreover, the political accountability of the municipal officials will insure that the *local* public interest is served; this is precisely what is contemplated by sections 53066 and 53066.1(p) of the California Government Code.

Even if *Goldfarb* and *City of Lafayette* could not be so harmonized, we would still adopt the authorization test for municipal defendants.[10] To the extent that there exists any conflict between *Goldfarb* and *Bates* on the one hand and *City of Lafayette* on the other, this Court believes that the language of *City of Lafayette* more accurately states the current view of the Supreme Court on this issue. The *Rouvin* case has already been argued in the Supreme Court and may give the Court an opportunity to clarify the relationship between *Goldfarb* and *City of Lafayette*. On the cases as they now stand, however, we decline to apply *Goldfarb*, *Bates*, and *Rouvin* to the case before us.[11]

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[10] It is tempting to distinguish *Goldfarb* as a case involving no governmental body at all, for the *Goldfarb* Court concluded that the State Bar "has voluntarily joined in what is essentially a private anticompetitive activity . . . ." 421 U.S. at 792. That interpretation, however, was foreclosed in *City of Lafayette*, 435 U.S. at 411-12 n.41 (plurality opinion of Brennan, J.).

[11] We also decline to follow *Televents, Inc. v. City of Martinez*, No. C-81-2376 (N.D. Cal. Oct. 23, 1981), which held

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The Court therefore concludes that the first part of the *Midcal* test is met—the Cities' plan to franchise one or more CTV operators (or to negotiate for municipal participation in CTV system ownership) is "clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105.

C. *Midcal's* "Active Supervision" Test

The second prong of the *Midcal* test is that the challenged policy "must be 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette*, 435 U.S. at 410 (plurality opinion of Brennan, J.)). The *Midcal* Court applied this requirement to conduct by *private* parties. However, the Court in *City of Boulder* left open the question of whether this requirement applies to *municipal* defendants.[12] We conclude that *Midcal's* active supervision requirement does not apply in this case.

A number of cases since *City of Boulder* have held that, at least where traditional municipal functions are concerned, active state supervision of authorized municipal action is not required. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 383-84 (7th Cir. 1983) (sewage col-

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that sections 53066 and 53066.1 of the California Government Code do not satisfy the first part of the *Midcal* test. *Televents* preceded *City of Boulder* and gave the entire state action question only summary consideration.

12 The Court stated that "[b]ecause we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance *must* or could satisfy the 'active state supervision' test focussed upon in *Midcal*. *City of Boulder*, 455 U.S. at 51-52 n.14 (emphasis added).

lection, transportation, and treatment), *appeal pending; Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983) (ambulance services), *appeal pending; Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983) (solid waste disposal services); *Hybud Equipment Corp. v. City of Akron*, 1983-1 Trade Cas. (CCH) ¶ 65,356 (N.D. Ohio April 6, 1983) (same); *cf. City of North Olmstead v. Greater Cleveland Regional Transit Authority*, No. 82-3135 (6th Cir. Dec. 2, 1983) (finding immunity for municipal operation of regional public transportation without discussing active supervision requirement); *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982) (finding immunity for municipal operation of airport and aircraft services without discussing active supervision requirement), *cert. denied*, — U.S. —, 103 S. Ct. 762 (1983).

Both the Seventh Circuit (in *Town of Hallie*) and the Eighth Circuit (in *Gold Cross Ambulance*) felt that requiring active state supervision over (traditional) municipal functions was unwise because such supervision erodes local autonomy, unnecessarily duplicates municipal supervision, and puts the state in the rather odd position of enforcing municipal ordinances.[13] The *Gold Cross Ambulance* court also emphasized that "[b]ecause municipal officials generally are politically accountable to the citizens they represent for their decisions regarding the challenged restraint, state supervision is not as necessary to prevent abuse as in the private context." 705 F.2d at

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[13] *See also City of Boulder*, 455 U.S. at 71 n.6 (opinion of Rehnquist, J., dissenting).

1014. This Court agrees that these factors cut strongly in favor of not requiring in this case the type of active state supervision required by the Court in *Midcal*.

The Seventh and Eighth Circuits also relied heavily on the argument that "requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity." *Town of Hallie*, 700 F.2d at 384 (quoting P. Areeda, *Antitrust Law* ¶ 212.2a at 47 (Supp. 1982)); *Gold Cross Ambulance*, 705 F.2d at 1014 (same). This argument is equivalent to stating that the state's ability to change its policy and the attendant municipal authorization constitutes sufficient state supervision.[14] This Court does not go so far as to say that the state's power to change municipal authorization will *always* obviate the need for more regularized supervision; however, in this case it would be clearly pointless to require regularized supervision by some agency, authority, or other arm of the state.

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[14] State supervision via authorization clearly does not satisfy the active state supervision requirement where private defendants are concerned; otherwise, the second prong of the *Midcal* test would never have any meaning because the state can always change its policy and its authorization. The Court also notes that a non-trivial state supervision requirement may apply to action by non-municipal governmental bodies. After all, the "active state supervision" requirement owes its origin to *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), in which the Court immunized the Arizona State Bar's ban on lawyer advertising partly because the State Bar rule was "subject to pointed re-examination by the policy-maker—the Arizona Supreme Court—in enforcement proceedings" *Id.* at 362. *See also Ronwin v. State Bar of Arizona*, 686 F.2d 692, 697 (9th Cir. 1982) (dictum), *cert. granted sub nom. Hoover v. Ronwin*, 103 S. Ct. 2084 (1983).

The legislative history of CTV regulation in California shows an active and interested legislature. In 1979, the legislature acted to increase competition in CTV rates by removing municipal authority to regulate rates under certain conditions. Cal. Gov't Code § 53066.1. This deregulation program was fine-tuned by two amendments in 1982. Act of Aug. 30, 1982, ch. 679, 1982 Cal. Stats. 572; Act of Sept. 21, 1982, ch. 1256, 1982 Cal. Stats. 380. Moreover, in section 53066.1(p), the legislature explicitly held open the possibility that it will again act to curtail municipal authority to regulate CTV. It would be a gross distortion of reality to lump this case in with *Midcal* and find no antitrust immunity because the state failed to supervise the implementation of its policies. Thus, the Court finds that the active state supervision test applied in *Midcal* does not apply to this case.[15] To put it another way, the Court finds that the legislative supervision via authorization that is present in this case satisfies the state supervision requirement applicable to municipalities.

Accordingly, the Court finds that the defendants are immune from antitrust liability for the challenged conduct. The plaintiff's antitrust claims are therefore dismissed.

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[15] This conclusion applies regardless of whether CTV regulation may be considered a traditional municipal function. On this point the Court notes a possible distinction between cable television and *community antenna* television. The latter entails the use of cable systems to improve reception of ordinary over-the-air television programming. The former entails the provision of programming created for the cable medium. Although community antenna television has been municipally regulated in California for over twenty years, it may be premature to determine whether CTV regulation is a traditional municipal function.

III. THE FIRST AMENDMENT CLAIMS

The plaintiff's First Amendment argument, like its antitrust argument, essentially states that the business of CTV operating must be thrown open to virtually everyone with the inclination to enter the industry. Plaintiff thus challenges the very institution of franchising CTV operators; it argues that CTV operating should be treated like newspaper publishing, which clearly could not be licensed or franchised as the Cities would franchise CTV operating. *Near v. Minnesota*, 283 U.S. 679, 713 (1931); *cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that no access requirement or "right of reply" rule could be applied to newspapers). The Cities argue that there is no First Amendment right to be a CTV operator because CTV operating is characterized by physical and economic scarcity and because operating a CTV system involves disruptive use of public property. The Court finds that the motion to dismiss cannot be granted because there exist important factual issues that cannot be decided on the pleadings alone.[16]

A. Standing and Ripeness

The Court finds that the plaintiff has standing to challenge the Cities' RFP process. Defendants argue that plaintiff lacks Article III standing under *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), in which the

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[16] The Court cannot say, at this time, whether these issues are capable of resolution on a motion for summary judgment. If the defendants so move, the Court will consider a summary judgment motion accompanied by affidavits and other documents permitted by Rule 56 of the Federal Rules of Civil Procedure.

Supreme Court held that neither an organization dedicated to the separation of church and state nor the organization's (taxpaying) employees had standing to challenge a donation of surplus Government property to a church-related college. The Court stated the minimum requirements for Article III standing as follows:

> Art. III requires the party who invokes the court's authority to show "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

454 U.S. at 472 (footnote omitted).

Since plaintiff objects to the requirement that it even *participate* in the RFP process, with its $5000 application fee and its minimum criteria for success, plaintiff clearly alleges real injury, fairly traceable to the challenged action, that plaintiff will personally suffer if it attempts to set up a CTV system in compliance with the Cities' requirements.[17] That injury would be redressed

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[17] It is of no consequence that plaintiff brought this lawsuit rather than participate at all in the RFP process. This is so for two reasons: first, plaintiff objects to the very act of participating in the process rather than to the prospective denial to plaintiff of a CTV franchise; second, plaintiff's First Amendment arguments challenge the RFP process as facially void. *See Lovell v. City of Griffin*, 303 U.S. 444, 452-53 (1938) ("As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it.") On plaintiff's readiness to enter the CTV operating industry, see note 4, *supra*.

by a favorable decision of this Court. The *Valley Forge* Court also set forth several "prudential" standing principles. *Id.* at 474-75. None of these principles apply to deprive plaintiff of standing. Finally, the injury alleged in this case bears absolutely no resemblance to the abstract and speculative injuries alleged in *Valley Forge*.

The Court also finds that the case is ripe for adjudication.[18] Even though no final action has yet been taken and the negotiable conditions of phase 2 of the franchising process are not yet known, the Court does have before it the RFP's minimum requirements and the fact that plaintiff must participate in the RFP process in order to have any hope of securing a franchise or license. In this connection, the Court notes that plaintiff alleges it sought a business license from each of the cities; plaintiff was told that it had to participate in the RFP process. Plaintiff also alleges that it sought pole attachment services from the defendant City of Palo Alto Utilities and from Pacific Telephone and Pacific Gas and Electric, but each utility responded that no pole attachment services would be provided until plaintiff obtained a CTV franchise from the Cities.

B. The Right to an Operating License

We accept, as the starting point for this discussion, the proposition that cable operators are entitled to *some* First Amendment protection. *Community Communications Corp. v. City of Boulder*, 660 F.2d 1370, 1376 (10th

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18 Defendants' assertion of *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) is unavailing as that case concerned only appellate ripeness. *Id.* at 1377 n.6.

Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978) (dictum), *aff'd on other grounds*, 440 U.S. 689 (1979). The problem lies in determining just what government regulations are permissible.

> The Supreme Court has repeatedly emphasized that "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it," *Southeastern Promotions, Ltd. v. Conrad*, [420 U.S. 546, 557 (1975)], for "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." [*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).]

Community Communications, 660 F.2d at 1377 (additional citations omitted). Moreover, in determining the degree of constitutionally permissible regulation, we must keep in mind that CTV technology may change over time; such developments may change the degree of permissible regulation. *Community Communications*, 660 F.2d at 1379 n.11; *Midwest Video*, 571 F.2d at 1052.

The defendants argue that cable television can be regulated like the broadcast (*i.e.*, over-the-air) media, while the plaintiff argues that all the freedoms applicable to newspapers apply to cable television. Cases such as *Community Communications* and *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976 (D.R.I. 1983) have held generally that CTV should not be afforded all the protections applicable to newspapers. Two other cases, both of which concerned challenges to specific FCC regulations of CTV, found no constitutional distinction between news-

papers and CTV, and they assumed that no distinction existed. *Home Box Office*, 567 F.2d at 44-46; *Midwest Video*, 571 F.2d at 1055-56 (dictum). Three major arguments are advanced to justify treating cable television more like the broadcast media and less like newspapers; they are: physical scarcity, economic scarcity (or natural monopoly), and the disruptive use of public property.

1. Physical Scarcity

In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the Supreme Court held that "[t]he right of free speech does not include . . . the right to use the facilities of radio without a license." *Id.* at 227. The Court reasoned that governmental licensing is necessary because the electromagnetic spectrum is simply not physically capable of carrying the messages of all who desire to speak over it. This principle has been reaffirmed many times. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969).

Physical scarcity in the broadcast media exists because each speaker's message interferes with the messages of those close to him on the electromagnetic spectrum; this is not the case with CTV. Nevertheless, there may be some practical limit to the number of coaxial cables that may be hung from utility poles or buried underground. The Court is aware of no case upholding the right of a municipality to deny a CTV franchise or license on the basis of *physical* scarcity.[19] The Cities urge the Court to

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[19] In *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968), the Eighth Circuit applied *NBC* to uphold certain

(Continued on following page)

apply *NBC* to this case; this the Court refuses to do because there is a material issue of fact as to whether physical scarcity exists.[20] Plaintiff offers to prove that it does not, and the Court cannot simply assume the contrary.

2. Economic Scarcity

A far more controversial argument states that a municipality may deny a CTV license because CTV operating is a natural monopoly. There is thus a type of "economic scarcity" that justifies licensing just as physical scarcity justified licensing in *NBC*.

It seems clear that the economic scarity argument cannot constitutionally be applied to newspapers. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-56 (1974). *Home Box Office* and *Midwest Video* have suggested that, at least on the records before those courts,

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FCC regulations of community antenna television. 399 F.2d at 69. The Court does not consider *Black Hills Video* to be compelling authority. First, CTV technology may have changed greatly since 1968. Second, the language employed by the Eighth Circuit in *Midwest Video*, 571 F.2d at 1052-57 casts considerable doubt on the continuing vitality of the constitutional holding of *Black Hills Video*. *See also, Home Box Office*, 567 F.2d at 45 n.80 (disapproving *Black Hills Video* and questioning other cases applying the physical scarcity rationale).

20 The Court cannot accept the defendants' argument that the application of *NBC* involves no issues of fact. The Cities argue that since the constitutionality of the (permissive) franchising statute, California Government Code section 53066, is not challenged, the Court should just assume its constitutionality and then apply only that part of *NBC* which holds that there is no right to a license. The existence of physical scarcity is central to the *NBC* case, and the Cities cannot avoid that factual issue.

the rule of *Miami Herald* applies equally to CTV. *Home Box Office*, 567 F.2d at 46; *Midwest Video*, 571 F.2d 1055 (dictim). Several other cases, however, have held that economic scarcity is a constitutionally permissible justification for municipal CTV licensing. *Community Communications Corp. v. City of Boulder*, 660 F.2d 1370, 1378-79 (10th Cir. 1981) (distinguishing *Miami Herald* and finding that natural monopoly is a constitutionally permissible justification for "some degree" of CTV regulation), *cert. dismissed*, 456 U.S. 1001 (1982); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976, 985 (D.R.I. 1983) (following *Community Communications*); *Hopkinsville Cable TV v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543, 547 (W.D. Ky. 1982); *cf. Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982) ("the apparent natural monopoly characteristics of cable television provide . . . an argument for regulation of entry").

The Court need not, at this point, decide this important constitutional question. Plaintiff offers to prove that there is, in fact, no economic scarcity. The Court now has before it absolutely no facts or expert opinion upon which to make such a determination.

Moreover, this factual issue has not recently been explored by other courts. For example, the court in *Community Communications* found that natural monopoly was a constitutionally permissible justification for CTV regulation, but then remanded the case for factual findings on, among other things, "the degree of natural monopoly or 'scarcity' characterizing the medium." 660 F.2d at 1379. In *Omega Satellite Products*, the court affirmed the denial

of a preliminary injunction; given the posture of the case and the lack of factual findings, the court described its conclusions on the First Amendment issues as only "tentative." 694 F.2d at 124, 127-29. The Court in *Hopkinsville Cable TV* based its finding that CTV was a natural monopoly on a 1972 case concerning community antenna television. 562 F. Supp. at 547. Finally, while it appears that the *Berkshire Cablevision* court took some testimony, it is not clear on what that court based its finding that CTV was a natural monopoly. We therefore find it unwise to reject out of hand the plaintiff's contention that, with current technology, CTV operating is not a natural monopoly.

3. Disruptive Use of Public Property

CTV operating differs significantly from newspaper publishing in that the former entails far more disruptive use of the public domain, *viz.*, attaching cables to utility poles or digging up streets to bury the cables. Several courts have recognized this factor as at least a partial justification for CTV regulation. *Community Communications*, 660 F.2d at 1377-79; *Omega Satellite Products*, 694 F.2d at 127; *Berkshire Cablevision*, 571 F. Supp. at 985; *Hopkinsville Cable TV*, 562 F. Supp. at 547. While this Court agrees with the position taken in the cited cases, the problem is more complex in California because of the existence of California Public Utilities Code section 767.5, which essentially dedicates surplus space and excess capacity on public utility poles, conduits, manholes, or other "support structures" for use by CTV corporations.[21] Al-

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[21] California Public Utilities Code section 767.5(b) reads as follows:

(Continued on following page)

though section 767.5 does not apply to publicly owned utilities, such as defendant City of Palo Alto Utilities, plaintiff asserts a common law dedication theory as to facilities owned by that defendant.

This raises the question of whether California has invited or consented to plaintiff's proposed use of the public domain and whether such permission bears constitutional significance. *See Community Communications*, 660 F.2d at 1377-78 ("Some form of permission from the

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> The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations.
>
> The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

Section 767.5(a) provides, in pertinent part, that

> (2) "Support structure" includes, but is not limited to, a utility pole, anchor, duct, conduit, manhole, or handhole.
>
> (3) "Pole attachment" means any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility.

government must, by necessity, precede such disruptive use of the public domain."). The Court finds that the significance of section 767.5 can best be assessed in light of the facts about current CTV technology. There may be a disparity between the degree of disruption contemplated by the California legislature and the degree of disruption comprehended by plaintiff's position. The Court therefore defers a decision on the constitutional significance of section 767.5.

CONCLUSION

The motion to dismiss is granted as to plaintiff's antitrust claims because the Cities' conduct is protected state action. The motion to dismiss is denied as to plaintiff's First Amendment claims because there exist significant factual questions that cannot be resolved on the pleadings alone.[22]

IT IS SO ORDERED.

DATED: February 14, 1984.

/s/ Eugene F. Lynch
United States District Judge

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[22] In addition to challenging the franchising process in general, plaintiff challenges specific parts of the Cities' RFP, such as its financial requirements and its program and channel requirements, including the local access rules. To a great extent, the propriety of these requirements depends on the degree of First Amendment protection that the Court ultimately finds appropriate. While the program and channel requirements *might be* invalid as content restrictions even if the Court finds that there is no general First Amendment right to a CTV license, the Court declines, at this time, to decide this issue, which is best considered as part of a plenary examination of the First Amendment implications of CTV franchising.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., a California corporation,	)	
Plaintiff,	)	No. C-85-2168 EFL
vs.	)	PRELIMINARY INJUNCTION
CITY OF PALO ALTO, CALIFORNIA, a municipal corporation, et al.,	)	(Filed March 23, 1987)
Defendants.	)	

On December 3, 1986, this Court entered its Order Granting Partial Summary Judgment in favor of plaintiff Century Federal, Inc. Defendants (hereinafter "Cities") have now indicated a willingness to grant plaintiff authority to construct and operate a cable system in the geographic areas of the respective Cities for the purpose of providing plaintiff the opportunity to limit damages that it seeks in this action. It is understood that the Cities do not waive the right to appeal any issue in the December 3 Order or waive the right to contest it or seeks its modification in any subsequent proceeding. Accordingly, in furtherance of the December 3 Order,

IT IS HEREBY ORDERED:

1. Within ten (10) days of date hereof, the Cities will issue a license to plaintiff, as defined by 47 U.S.C. section 522(8) of the Cable Communications Policy Act of 1984, so as to allow it to construct and operate a cable television system within the entire Service Area covered

by the franchise agreement between defendants and Cable Coop. Said license will be subject to such terms and conditions that the Cities desire and believe they have proper legal authority to require.

2. Plaintiff's right to commence construction of its cable television system shall not be delayed by reason of its having objected to any term or condition of the license, unless otherwise ordered by this Court. However, pending further order of this Court, all aerial and underground construction of plaintiff's system pursuant to this preliminary injunction will be subject to all of the Cities' proper, reasonable regulations, which are not preempted by state law, aimed at minimizing disruption to public resources and inconvenience to their residents. When the Court has adjudicated the legality of any other disputed terms and conditions with which plaintiff has not complied pending further proceedings herein, plaintiff will be required to comply immediately with those terms and conditions found to be valid in order to continue and complete construction and operation of its system unless the Court orders otherwise.

3. Plaintiff's rights under this Order or any license issued in compliance therewith are subject to the outcome of the further proceedings in this Court and of any appellate review of this Court's orders and eventual judgment.

IT IS SO ORDERED.

DATED: March 20, 1987.

/s/ Eugene F. Lynch
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., a California corporation,	)	No. C 85-2168 EFL
Plaintiff,	)	NOTICE OF APPEAL
vs.	)	
CITY OF PALO ALTO, CALIFORNIA, a municipal corporation, *et al.*,	)	(Filed October 1, 1987)
Defendants,	)	
UNITED STATES OF AMERICA,	)	
Intervener.	)	

Pursuant to 28 U.S.C. § 1252, Defendants City of Palo Alto, City of Palo Alto Utilities, City of Atherton and City of Menlo Park hereby appeal to the Supreme Court of the United States from: (1) the Court's September 1, 1987 Order (except for those portions of the Order reserving certain issues for further briefing and decision by the Court); and (2) the Court's December 3, 1986 Order Granting Partial Summary Judgment.

DATED: October 1, 1987

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[Affidavit of Service Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., a California corporation, Plaintiff, vs. CITY OF PALO ALTO, CALIFORNIA, a municipal corporation; CITY OF PALO ALTO UTILITIES, a municipal utility; CITY OF MENLO PARK, CALIFORNIA, a municipal corporation; and CITY OF ATHERTON, CALIFORNIA, a municipal corporation, Defendants.	No. C-83-4231 EFL ORDER REMOVING MOTIONS FROM CALENDAR (Filed November 21, 1984)

Upon further consideration of the new federal law affecting cable communications, the "Cable Communications Policy Act of 1984," P.L. 98-549, 98th Cong., 2d Sess. (1984), *reprinted in* 130 CONG. REC. H12234-44 (daily ed. Oct. 11, 1984), the Court has decided to remove all pending motions in this matter from the calendar. As the Court indicated in the status conference held on November 13, 1984, the new Act clearly endorses the right of a designated governmental authority to offer an exclusive franchise to a cable operator (Sec. 621(a)(1)). In light of Congress' explicit authorization of exclusive franchising, and the likelihood that implementation of the new

law may render plaintiff's action moot, the Court hereby removes all calendared motions and issues the following instructions as to the future course of the litigation.

The nature of the present controversy will undoubtedly be affected by the Cities' decision to either grant or not grant a cable television franchise prior to December 29, 1984, when the provisions of the Act are to take effect (Sec. 9(a)). The defendants have represented to the Court in their motion papers that no franchise has yet been issued (Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, filed Sept. 21, 1984, p. 3). If a franchise has not been granted by December 29, 1984, the terms of the Act will apply to the Cities (Sec. 637(a)). It would appear that any remaining challenge the plaintiff might have to the Cities' authorization process would need to be in the form of a new lawsuit based either upon the terms of the Act or upon the ground that the Act itself is unconstitutional. Therefore, unless the Court is informed by affidavit that a franchise has been awarded before the effective date, the Court intends to dismiss the action without prejudice on its own motion.

In spite of the fact that the Act provides a general sanction for exclusive franchising, the plaintiff may still have a cognizable First Amendment claim based upon the allegations contained in its current complaint if the Cities grant a franchise before the effective date of the Act and do not comply with its provisions. Although the Court has understood plaintiff's argument to be that any restriction whatsoever on its right to enter the cable industry is unconstitutional, it is apparent from the state-

ments of plaintiff's counsel at the status conference and the arguments set forth in its motion papers that plaintiff now intends to object not only to the concept of franchising, but also to the specific minimum requirements established by the Cities in their "Request for Proposals" (RFP). Given the possibility that the Cities will award their franchise under the provisions of the new Act, the Court sees no reason to address at this time plaintiff's claim that certain minimum requirements of the current RFP violate the First Amendment. To the extent the parties' pending motions are relevant to this claim, the Court will permit the motions to be renoticed and heard if and when a franchise is granted pursuant to the contested terms of the RFP.

DATED: November 21, 1984

/s/ E. Lynch
EUGENE F. LYNCH
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., a California corporation,	)	
Plaintiff,	)	No. C-83-4231 EFL
vs.	)	ORDER OF DISMISSAL
CITY OF PALO ALTO, CALIFORNIA, a municipal corporation, et al.,	)	(Filed January 29, 1985)
Defendants.	)	

The Court has been informed by counsel for the defendant cities that no cable franchise was issued before December 29, 1984. Therefore, in accordance with the Court's order of November 21, 1984, this action is hereby dismissed without prejudice.

IT IS SO ORDERED.

DATED: January 29, 1985.

/s/ E. Lynch
EUGENE F. LYNCH
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., a California corporation,	)	
Plaintiff,	)	NO. C-85-2168 CAL
v.	)	COMPLAINT FOR SHERMAN ACT VIOLATIONS; CIVIL RIGHTS ACT VIOLATIONS INCLUDING FIRST AMENDMENT VIOLATIONS; CLAIMS FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF [JURY DEMANDED]
CITY OF PALO ALTO, CALIFORNIA, a municipal corporation; CITY OF PALO ALTO, UTILITIES, a municipal utility; CITY OF MENLO PARK, CALIFORNIA, a municipal corporation; and CITY OF ATHERTON, CALIFORNIA, a municipal corporation:	)	
Defendants.	)	

Plaintiff Century Federal, Inc., brings this action against the defendants, demands a jury trial, and alleges as follows:

PRELIMINARY ALLEGATIONS

I. *The Parties*

1. Plaintiff is a corporation in good standing existing under the laws of the State of California and qualified to do business within the State of California. Plaintiff was organized and incorporated for the purpose of engaging in First Amendment expression by and through the operation of a cable television business.

2. Defendant City of Palo Alto, California, is a municipal corporation organized and existing under the laws of the State of California.

3. Defendant City of Palo Alto Utilities is a department of defendant City of Palo Alto and is the owner and operator of poles used or useful for the provision of pole attachment services in the City of Palo Alto.

4. Defendant City of Menlo Park, California, is a municipal corporation organized and existing under the laws of the State of California.

5. Defendant City of Atherton, California, is a municipal corporation organized and existing under the laws of the State of California.

6. The defendant cities of Palo Alto, Menlo Park, and Atherton (hereinafter sometimes collectively referred to as "THE CITIES") are, among others, co-conspirators in the "Request for Proposals" (RFP) process described below.

II. *Jurisdiction and Venue*

7. The claims herein arise under Sections 1 and 2 of the Sherman Act (15 U.S.C. Section 1 and 2) and are

brought pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. Sections 15 and 26). This Court has jurisdiction over these claims pursuant to 28 U.S.C. Section 1337. The claims herein also arise under the Civil Rights Act (42 U.S.C. Section 1983). Jurisdiction is conferred on this Court by 28 U.S.C. Sections 1331, 1343, 2201 and 2202. Certain of the claims herein (the Fourth and Fifth) also arise under the Common Law, statutes, and Constitution of the State of California, including, but not limited to, Section 767.5 of the California Public Utilities Code. Jurisdiction of the court over these claims is ancillary and pendent to the court's jurisdiction over plaintiff's First through Third Claims for Relief.

8. The violations of law herein described have been and are being performed within the Northern District of California, and the resulting injury to plaintiff is being suffered within the Northern District of California.

III. *The Business of Cable Television*

9. The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content. A cable television company is not a public utility, but rather is a recognized member of the media and is a First Amendment speaker. Cable television companies do not impose heavier burdens on public facilities, including the public rights-of-way, than those imposed by other First Amendment speakers, such as

newspapers, magazines, movies, theatres and sports entertainment providers (sports events promoters).

10. A cable television company attempting to operate within the Cities of Palo Alto, Menlo Park and Atherton, California, hereinafter "THE CITIES", would be a participant in a competitive sub-market where competition in the same marketplace by other members of the same medium is both technologically and eocnomically feasible. In addition to competition within this sub-market, other disseminators of news, information and entertainment by way of the television medium, such as MDS (Multipoint Distribution System, generally used for delivery of pay television by use of microwave signals), STV (coded Subscription TV, a broadcast television signal), SMATV (satellite master antenna, a cable television system located entirely on private property, and not using public utility pole attachment services), DBS (Direct Broadcast Satellite, home satellite reception terminals), video cassettes and discs, and LPTV (low power broadcast television), constitute existing and/or rapidly expanding sources of competition, as do more traditional media, such as AM and FM radio, UHF and VHF broadcast television, movies, theatre, newspapers and magazines. Cable television companies compete in the commerce of providing news, information and entertainment in which private entrepreneurs can, and should, make the decisions as to how most efficiently to allocate resources to satisfy that demand.

11. Cable television companies disseminate their news, information and entertainment to viewers by transmitting electronic signals from a central location (a head-

end) through cables to the television sets of subscribers. These cables are attached to public utility poles (or placed in conduit) located on property owned in fee by the public utility, or on, over or under easements owned by the public utility running over either public or private rights-of-way. For a number of years, co-conspirators Pacific Telephone and Telegraph Company, hereinafter "Pacific", and Pacific Gas and Electric Company, hereinafter "PG&E", have dedicated surplus space on and in their poles and communications structures to the provision of pole attachment services to cable television companies. The Legislature of the State of California has legislatively found the fact of said dedication to result in the provision of such attachment service as a public utility service available to the class of consumers known as cable television companies. And, by the enactment of Section 767.5 of the Public Utilities Code, has established certain pricing standards for that service when provided by privately-owned utility companies. Defendant City of Palo Alto Public Utilities has elected to, and has announced its intention to make its poles and support structures available for the provision of pole attachment services for cable television, and has thus dedicated its assets for such purpose and is required to provide said service at reasonable prices and on reasonable terms.

12. At all relevant times herein, up to and including the present, plaintiff has desired to engage in the dissemination of news, information and entertainment through the operation of a cable television company servicing subscribers within THE CITIES, and to provide private telecommunications service to interstate customers. Plain-

tiff seeks, for example, to utilize its cable television system to disseminate local news throughout THE CITIES engaging, for example, in live coverage of and commentary by its reporters on City Council sessions. At all times, up to and including the present, plaintiff has been ready, willing and able to operate such a cable television company. Plaintiff, through its parent and sister companies, has presently available to it the financial, technical and managerial ability to operate such a business. It desires to and is prepared to do so, and would presently be operating such a business were it not for the acts of defendants. The officers and owners of plaintiff have substantial experience operating such businesses. At all relevant times up to and including the present, plaintiff has been willing to abide by any and all legal and reasonable police power rules and regulations of each of the City defendants, and to comply with any and all legal and reasonable requirements of defendant City of Palo Alto Utilities, Pacific and PG&E, the owners of the utility structures used or useful for the provision of pole attachment services in said geographic area.

13. Prior to the filing of the complaint herein, plaintiff sought a business license from each of THE CITIES. The City of Palo Alto and the City of Atherton do not provide for business licenses in any event. The City of Menlo Park denied plaintiff a business license to operate a cable television company for the stated reason that plaintiff did not have a cable television "franchise". Plaintiff requested such a "franchise" from the City of Menlo Park. The request was denied and plaintiff was referred to the City of Palo Alto for such a franchise for the stated reason that, pursuant to agreement between the City of

Menlo Park and the City of Palo Alto, Palo Alto was given the right to select a single cable television company to operate in both of said municipalities.

14. Plaintiff sought pole attachment service from the City of Palo Alto Utilities, Pacific, and PG&E, so as to permit plaintiff to construct its cable television system. Said utilities, and each of them, responded that no pole attachment services would be furnished to plaintiff unless and until plaintiff obtained a cable television franchise from THE CITIES. On information and belief, the City of Palo Alto Utilities, along with Pacific and PG&E, is a member of the Northern California Joint Pole Association. The members of said association, pursuant to the provisions of an agreement, allocate access to utility poles in such a manner as to protect each other from their respective competitors. Further, co-conspirator Pacific is an announced competitor for the provision of cable television service in THE CITIES.

IV. *The "RFP" Auction*

15. Plaintiff attempted to obtain from THE CITIES, and each of them, any and all licenses, permits or "franchises" (hereinafter collectively referred to as "permits") which THE CITIES believed were necessary for plaintiff to obtain before beginning operation of a cable television business within the respective City limits so as to satisfy the demands of said utilities. THE CITIES, and each of them, responded that no permits would be issued unless plaintiff participated in an auction process held by a combination of THE CITIES and some of their co-conspirators for the purpose of issuing such permits only to the

one "bidder" for the market which the City of Palo Alto deemed "best"; that each of THE CITIES, and certain other jurisdictions had formed a combination for the express purpose of increasing their market control power and had denominated the City of Palo Alto as their agent to choose a "franchise" holder; and that pending such a selection THE CITIES, and each of them, had formally or informally placed a moratorium on the right of anyone to conduct a cable television business in THE CITIES.

16. THE CITIES, at the instigation and urging of the City of Palo Alto, have entered into a combination and conspiracy pursuant to the terms of which they have agreed to conduct a "cable television franchising process" through a "Request for Proposals" (RFP) auction process on behalf of all THE CITIES; THE CITIES: (a) have agreed to allow Palo Alto to award "the franchise" and administer "the franchise;" (b) have agreed to allow Palo Alto to assess, collect, allocate and disburse a percentage of the "franchisee's" annual gross revenues; (c) have joined together to close their geographic markets to all cable television service providers during the pendency of the "cable television franchising process;" (d) have agreed to allow the City of Palo Alto "to require that the cable television operator provide a series of contributions of facilities, channel space, in-kind contributions;" and (e) have so acted and conspired and closed their geographic markets for the purpose of acting anticompetitively and "enhancing" their ability to conduct an illegal auction of First Amendment and other rights. Other participants in this conspiracy are the Counties of San Mateo and Santa Clara, and the City of East Palo Alto.)

17. The above-mentioned auction process, identified by THE CITIES as a "Request for Proposals" process, is being operated by and on behalf of THE CITIES so as to create an artificial and un-natural cable television monopoly in designated geographic areas by exercising control over access to the market through the artifice and device of the conspiracies and combinations between THE CITIES and their co-conspirators. This process denies all unfavored companies, including plaintiff herein, the use of public utility pole attachment services and the use of the public rights-of-way.

18. Having, as a result of said conspiracies and combinations, gained control of access to the market place, THE CITIES are in the process of attempting to maximize the amount of monies, property, free or reduced-rate services, subservience, and other opportunities for the acquisition of power, which they anticipate will be the fruits of their conspiracy.

V. *The RFP's "Minimum" Requirements*

19. The contractual concessions sought by THE CITIES from any cable television operator allowed to do business in the designated geographical areas, will give THE CITIES oppressive control over the freedom of any cable television operator to make ordinary managerial and editorial decisions. The "RFP" of THE CITIES states that they "expect" that, in negotiating the franchise agreement, "an applicant will waive any rights created by law that are contrary to or inconsistent with the terms and conditions in this RFP. . . . The franchise agreement will also provide that the franchisee agrees to waive any rights created by law that are contrary to or

inconsistent with the negotiated terms of the franchise agreement." (RFP, Exhibit V, p. 18.) (A means for guaranteeing such willingness to waive all legal rights is to require plaintiff, were it to respond to the "RFP," to divulge instances where it has "challenged[d] . . . any federal, state, or municipal cable or franchise rule." (RFP, p. 27.)) Said inquiries and controls amount to unreasonable restraints on the right to do business as a cable television company.

20. Further, the "RFP" contains "minimum" requirements for a cable television system in the service area. (RFP, p. 16.) Applicants for a "franchise" through the "RFP" auction process must submit their plans for satisfying these "minimum" requirements in a format which will allegedly permit Palo Alto's so-called "cable television consultant" to compare applicants' responses. (*Ibid.*) Applicants are encouraged to "delineate particularly those characteristics" of their proposals "which exceed the minimum requirements". (RFP, p. 2) Applicants must submit technical, construction, ownership, and extensive financial information regarding themselves and their proposed systems. Applicants must submit their ideas concerning, reactions to, and willingness to participate in (1) a joint venture with Palo Alto (i.e., where ownership of the system is shared with Palo Alto) and (2) a management contract with Palo Alto whereby it would own the system but would arrange for a private operator. (RFP, p. 34 *et seq.*) Applicants must submit their ideas concerning provision of "universal service," i.e., free or below-cost service. (RFP, p. 38 *et seq.*)

21. On the basis of the responses to the entire "RFP" (applicants are explicitly told that "partial" responses

will not merit consideration (RFP, pp. 38 *et seq.*)), the City Manager of Palo Alto, Palo Alto's cable coordinator and its cable television consultant (and his staff) will "evaluate" the applicants but not "rank" them. (RFP, p.7.) The comparison will be made on the basis of "services and rates," "technical/construction," "financial," "local commitment" and "ownership/structure" categories. (*Ibid.*) Additional categories may be added. (*Ibid.*) "Local commitment" tests the applicants' "overall philosophy and commitment to the service area, its institutions, and its place within the overall development of cable service throughout the region", including "plans for fostering a sense of community through local uses of the cable system" and "commitment to meet the requirements and objectives of the service area in light of the development of cable within the surrounding region." (RFP, p. 8.) According to the RFP, "significant weight" is to be given to the applicants' local commitment and commitment to services "which will foster a sense of community throughout the service area." (RFP, p. 11.) (In connection with its philosophy each applicant must divulge the "local ascertainment activities . . . undertaken [in] preparation of its proposal" (RFP, p.12, n.4) and the assumptions, "demographic data" and "source of all data" (RFP, p. 17 and n. 9) used to prepare a response to the RFP.)

22. After the evaluation, Palo Alto may, if it desires "target an applicant for negotiations" concerning "the terms and conditions of [Palo Alto's] participation in the ownership of the system" (RFP, p.34) or Palo Alto may decide to target one or more applicants for franchise agreement negotiations. In this manner, Palo Alto will

identify the serious bidders and force them to bid against each other directly for the privilege of being awarded the "franchise" in THE CITIES. Palo Alto will thus eventually identify, and award the franchise for THE CITIES to the highest and best bidder, unless it elects to award the "franchise" to itself, a process for which it has also made provision in its conspiracy with Menlo Park, Atherton and others.

23. As aforementioned, an applicant for a "franchise" through the RFP auctioning process must satisfy certain "minimum" requirements. A key "minimum" requirement is willingness to provide "the full range of service categories made possible through state-of-the-art cable technology." (RFP, p. 16; also, *id.* at p. 18.) An applicant must be willing to provide at least 108 channels and three parallel cable systems for "state-of-the-art" cable television service in order to be considered for selection as the "franchisee." The "RFP" states that Palo Alto entered into the combination with the other municipalities in order "to enhance" the opportunity to obtain state-of-the-art cable television services in the service area." (RFP, p. 14.)

24. A key feature of the Palo Alto's "RFP" process is that it has set no fixed terms and conditions which, if satisfied, will automatically result in award of a "franchise" or permission to operate a cable television system. The "RFP" states that "[t]he minimum requirements do not constitute an offer by the City of Palo Alto or any department or agency thereof to enter into an agreement containing these terms and the listing of these minimum requirements is not intended to restrict to any degree the Palo Alto City Council's ability . . . to negotiate with the

successful franchise applicant an agreement that will best serve the interests of the people within the service area." (RFP, p. 16, n. 6.) Thus, the City's "RFP" contains no narrow, precise and definite "time, place and manner" standards governing the issuance of permits connected with the use of the means of disseminating news, information and entertainment (use of utility pole attachment services and municipal streets and rights-of-way), but is instead a vague, standardless and open-ended device for testing an applicants' business and community philisophy. Palo Alto has stated that the RFP was explicitly designed this way in order to avoid having to "bid against itself" in setting concrete, definite standards governing the issuance of permission to conduct a cable television business within THE CITIES. Instead, the idea was, and is, to have applicants bid against each other in offering concessions and donations, in cash and in kind, for the privilege of being allowed to negotiate with Palo Alto for the conduct a cable television business within THE CITIES.

25. THE CITIES are attempting to force the following conditions and *prior restraints* upon plaintiff's ability to disseminate:

(a) Plaintiff would have to pay a non-refundable $5,000.00 "filing fee". (RFP, p. 6.)

(b) Plaintiff would have to agree to "reimburse the City for the full amount of all actual expenses [including consultant fees in an unknown amount] of the City incurred during the cable television franchising process. . . ." (RFP, pp. 6-7.)

(c) Plaintiff would have to agree to respond to the entire RFP, including questions asking for di-

vulgence to the public and plaintiff's competitors of sensitive confidential and proprietary technical and financial information (such as lenders and terms of loans) (RFP, pp. 4-5), since no partial response to the RFP will be considered. (RFP, p. 4; pp. 28-29.) (Palto Alto, of course, could use such information to go into the cable television business itself; the RFP explicitly provides for such an eventuality.) Plaintiff would have to agree to complete the entire set of 30 schedules of financial and related information (RFP, Exhibit VI), the six schedules of financial and related information for *all* of its (or its corporate parent's) other cable systems (RFP, Exhibit VIII), and the eight schedules of financial and related information for municipal ownership options (RFP, Exhibit VIII).

(d) Plaintiff would have to agree to a "start-up" endowment of $200,000, plus a "modest" annual contribution during the term of the franchise, to defray the costs of a "local access" organization. (RFP, Exhibit 5, pp. 14-15 and n. 5.)

(e) Plaintiff would have to agree to pay the City a percentage of its annual gross revenues. (RFP, Exhibit V, p. 13.)

(f) Plaintiff would have to agree to provide so-called "state-of-the-art" interactive (two way) service, including data transmission service, regardless of whether authorization from the State Public Utilities Commission might be required for some, if not all, such services, regardless of customer

demand or preference, and regardless of the financial implications of doing so. (RFP, Exhibit V, pp. 3-5, 9-10.) Plaintiff would also have to agree to Palo Alto's control of the provision of an "appropriate mix" of program services, in a "Basic Subscriber Service Package" to residential subscribers, with 40 channels consisting of local over-the-air broadcast signals, access channels, automated service (community bulletin board) channels, "cable program" packages (satellite programs), and "operator-originated programming." (RFP, Exhibit V, p. 3.)

(g) Plaintiff would have to agree to provide at least one *free* drop from both subscriber cables and the institutional cable, together with *free* basic service, and, if necessary for libraries and schools, *free* televisions, for *each* public building in the service area. (RFP, Exhibit V, p. 14.)

(h) Plaintiff would also have to agree to provide free use of an "appropriate percentage of the bandwidth" on the institutional cable by governmental and "other public institutions." (RFP, Exhibit V, p. 14.)

(i) Plaintiff would also have to provide contributions of equipment, facilities, staff and training to aid the public in pondering and producing "local access programming." (RFP, Exhibit V, p. 14.) Plaintiff would have to agree to provide an "appropriate number of channels on the subscriber cable" for access programming even if there is no demand for them. There must be *free* separate

access channels for public, governmental, institutional (educational) *and other* users, for both audio and data services. (RFP, Exhibit V, p. 6.) Plaintiff would have to agree to work with Stanford, the Palo Alto School District, Foothill College, *and other* educational institutions "to meet their needs and requirements" and "to cooperate" with these and other "educational institutions, in the development of "local programming and services." (RFP, Exhibit V, p. 5.)

(j) Plaintiff would have to agree to provide "two to three small-state mobile production units". (RFP, Exhibit V, p. 7.)

(k) Plaintiff would have to agree to let THE CITIES decide what prices it should charge its customers, leaving all such business decisions (including program "packages") solely under City control. (RFP Exhibit V, p. 3, 13). Plaintiff would have to agree that any and all services could be purchased without purchasing "Basic Service." (RFP, Exhibit V, p. 2).

(l) Plaintiff would have to agree to permit the City to control plaintiff's customer relations. (RFP, pp. 11-13; RFP, Exhibit V, pp. 13-17). Plaintiff would have to agree that the City Manager of Palo Alto could, for example, determine the "needs of subscribers" and the "circumstances under which the cable system should be upgraded or additional capacity . . . provided" (RFP, Exhibit V, p. 16). Plaintiff would have to agree that at some indefinite time "before the tenth (10th)

year" the franchise agreement could be renegotiated "in order to keep pace with technological advances and other changes that may have occurred since the award of the franchise." (RFP, Exhibit V, p. 18).

(m) Plaintiff would have to agree to submit to the control of a "Cable Franchise Review Board", composed of representatives of THE CITIES and paid for by plaintiff. (RFP, p. 15, RFP, Exhibit II, pp. 3-4; RFP, Exhibit V, p. 17). Plaintiff would also have to agree to submit to the control of a "new entity" administering use of *both* the public and the non-profit access channel. (RFP, Exhibit II, p. 5).

(n) *Plaintiff would have to agree to waive any rights created by law that are contrary to or inconsistent with the RFP or the franchise agreement* (RFP, Exhibit V, p. 18).

According to the auction procedure set up by the City, if plaintiff were to fail to agree to *any* of the above requirements (as well as many others), it would be automatically barred from exercising its First Amendment rights via operation of a cable television system within the designated areas of THE CITIES.

26. Plaintiff is informed and believes, and on that basis alleges, that, even were it to satisfy each and every one of the burdensome prior restraints listed above, plaintiff would still be denied the right to operate a cable television system within THE CITIES unless it also "outbids", based on unknown standards, not only every other

person desiring to operate such a system, but in addition, the City of Palo Alto.

FIRST CLAIM FOR RELIEF

(Sherman Act, Section 2)

* * *

SECOND CLAIM FOR RELIEF

(Sherman Act, Section 1)

* * *

THIRD CLAIM FOR RELIEF

(Civil Rights—First Amendment)

46. Plaintiff incorporates herein by reference the allegations of paragraph 1 through 45 above, and further alleges as follows.

47. This claim for relief seeks to redress the deprivation, under color of law, of rights secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution. Injunctive relief, declaratory relief, and damages are sought pursuant to 42 U.S.C. Section 1983. Jurisdiction is conferred on this Court by 28 U.S.C. Sections 1331, 1343, 2201 and 2202.

48. Plaintiff is informed and believes, and thereon alleges, that some or all of the acts alleged above were committed in furtherance of a past and continuing conspiracy by defendants, acting in concert with other co-conspirators, and with the specific intent of depriving plaintiff of its First and Fourteenth Amendment right to express itself.

49. As described above, defendants have attempted to impose burdens and requirements upon plaintiff, as a cable television company, which are unrelated to any compelling governmental interest, are overly restrictive, and amount to prior restraints upon plaintiff's ability to speak. Furthermore, the burdens are imposed in a discriminatory manner, based upon wholly subjective, arbitrary and standardless criteria. Plaintiff is informed and believes, and thereon alleges, that the burdens and requirements imposed upon plaintiff are more onerous than those imposed on other businesses, even those not engaged in First Amendment activities.

50. Each act taken by defendants, and each of them, has been taken under color of governmental authority and pursuant to an official policy or custom of such authority. Plaintiff is informed and believes, and thereon alleges, that the governmental authority under color of which defendants have purported to act is California Government Code Section 53066 and 42 U.S.C. Sections 601 *et seq.*, and that defendants contend that these provisions authorize them to take the restrictive actions described above, and to auction off the right to engage in the dissemination of news, entertainment and ideas within their boundaries.

51. Defendants' actions were not properly taken pursuant to Government Code Section 53066 because that statute is purely permissive in nature, and was enacted simply to clarify that local governments could consider a wide variety of criteria, not merely cash, in choosing to enter into contracts with cable television companies. Thus, defendants have acted under wrongful color of governmental authority in taking the actions described above.

52. To the extent that defendants attempt to apply Government Code Section 53066 and/or 42 U.S.C. Sections 601 *et seq.* in a manner designed to authorize auctioning off the cable television market within their boundaries, thus automatically excluding all but one willing speaker, said statutes (as so applied) are unconstitutional.

53. To the extent and in the event that defendants have the authority to "license" or "franchise" cable television activity within their borders based upon their ownership of the public rights-of-way and their asserted right to control the use thereof, defendants have, by the process of allowing one cable television company to use the same, made the streets a public forum from which they cannot exclude plaintiff herein.

54. The conspiracy and actions of defendants, and each of them, as alleged above, presently deprive and imminently threaten further to deprive plaintiff of rights guaranteed by the First and Fourteenth Amendments.

55. Plaintiff has no adequate legal, administrative or other remedy by which to prevent or minimize the continuing irreparable harm to its constitutional rights. Unless the defendants are enjoined from committing the above-described violations of freedoms of speech and press, plaintiff will continue to suffer great and irreparable harm as aforesaid.

56. As a proximate result of defendants' actions as described above, plaintiff has been damaged in a substantial amount as yet undetermined, but which will be set forth in full when ascertained.

WHEREFORE, plaintiff prays for relief as hereinafter set forth.

FOURTH CLAIM FOR RELIEF

(State Guarantee of Freedom of Expression)

* * *

FIFTH CLAIM FOR RELIEF

(Right To Use Of Dedicated Facilities
For Interstate Communications Purposes)

* * *

66. As a proximate result of defendants' actions as described above, plaintiff has been damaged in a substantial amount as yet undetermined, but which will be set forth in full when ascertained.

WHEREFORE, plaintiff prays for relief as follows:

A. For damages as alleged above and in such further amounts as are proved;

B. For the trebling of such damages;

C. For a declaration of such of plaintiff's rights as is appropriate in the circumstances;

D. For an order enjoining defendants, and each of them, from unreasonably interfering with plaintiff's right and opportunity to provide cable television services within the City of Menlo Park, the City of Atherton, the City of Palo Alto, or any other city or county under the control and domination of Palo Alto, or any other defendant or co-conspirator;

E. For costs of suit, including reasonable attorney's fees; and

F. For such other and further relief as this Court deems proper.

Respectfully submitted,

FARROW, SCHILDHAUSE, WILSON & RAINS

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Century Federal Inc.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., a California Corporation,	NO. C 85-2168 EFL
Plaintiff,	NOTICE OF CLAIM OF POSSIBLE UNCONSTITU-
vs.	TIONALITY PURSUANT TO
CITY OF PALO ALTO, CALIFORNIA, a municipal corporation; CITY OF PALO ALTO UTILITIES, a municipal utility; CITY OF MENLO PARK, CALIFORNIA, a municipal corporation; and CITY OF ATHERTON, CALIFORNIA, a municipal corporation,	LOCAL RULE 200-8
Defendants.	

Pursuant to Local Rule 200-8, plaintiff hereby files and serves upon the United States Attorney this notice of claim of possible unconstitutionality of a federal statute.

Specifically, plaintiff questions the constitutionality of the Cable Communications Policy Act of 1984, 47 U.S.C. § 601 et seq., if and to the extent that such Act is construed, contrary to the views expressed in *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1411 n. 11 (9th Cir. 1985), so as to grant defendants, or any of them, the authority to limit the number of cable television systems operating within their boundaries to fewer systems that can be physically accomodated upon the public utility facilities and other public property necessary for the installations of such systems.

Dated: August 5, 1985

Respectfully submitted,

FARROW, SCHILDHAUSE & RAINS

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(Proof of service omitted)

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Century Federal, Inc.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT
OF CALIFORNIA

CENTURY FEDERAL, INC., a California Corporation,	)	NO. C 85 2168 EFL
Plaintiff,	)	AMENDED NOTICE OF
v.	)	CLAIM OF POSSIBLE
CITY OF PALO ALTO, CALIFORNIA, a municipal corporation; CITY OF PALO ALTO UTILITIES, a municipal utility; CITY OF MENLO PARK, CALIFORNIA, a municipal corporation; and CITY OF ATHERTON, CALIFORNIA, a municipal corporation,	)	UNCONSTITUTIONALITY PURSUANT TO 28 U.S.C. SECTION 2403 (a) and (b)
Defendants.	)	

Pursuant to Local Rule 208 and 28 U.S.C. Section 2403(a) and (b), plaintiff hereby files and serves upon this Court, the Attorney General of the United States and the Attorney General of the State of California, this notice of claim of possible unconstitutionality of federal and state statutes.

Specifically, plaintiff questions the constitutionality of the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 et seq., and California Government Code §§ 53066 and 53066.1, under the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution, and under Article I, §§ 1, 2, 7 and 13 of the California Constitution, insofar as any or all of those provisions authorize or require, or are construed to authorize or require, the denial of equal protection of the law, the abridgement of the right to freely speak and publish, the taking of property without just compensation, the denial of procedural or substantive due process of the law, or the invasion of privacy or unreasonable searches and seizures as is evidenced by the ordinances of defendants being applied to the construction and operation of a cable system.

Respectfully submitted,

FARROW, SCHILDHAUSE & WILSON

THE BOCCARDO LAW FIRM

/s/ By Harold R. Farrow
Harold R. Farrow

Attorneys for Plaintiff
Century Federal, Inc.

(Proof of Service Omitted)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

June 10, 1987

Chambers of
Eugene F. Lynch
United States District Judge

Honorable Edwin Meese, III
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

The Court presently has under submission a motion for partial summary judgment filed by defendants in *Century Federal, Inc. v. City of Palo Alto, et al.*, C-85-2168-EFL. Pursuant to 28 U.S.C. section 2403(a), this letter certifies to the United States Attorney General that the above motion draws into question the constitutionality of the Cable Communications Policy Act of 1984 ("the Act"), an "Act of Congress affecting the public interest." Specifically, the parties have agreed that, at the very least, the constitutionality of the following provisions of the Act are being implicated: sections 611 (47 U.S.C. section 531); 612 (47 U.S.C. section 532); 621 (47 U.S.C. section 541); 622 (47 U.S.C. 542); 623 (47 U.S.C. section 543); 624 (47 U.S.C. section 544); and 632 (47 U.S.C. section 552).

The United States may intervene in this action by filing a memorandum and supporting evidence addressing the question of the Act's constitutionality. In light of the fact that this action has been before the Court since 1983 and that the United States has already been notified of similar

constitutional questions in a case before the Honorable William W Schwarzer of the Northern District of California, *Group W Cable, Inc. v. The City of Santa Cruz,* C-84-7546 WWS, the United States is directed to file its pleadings, if any, within a maximum of twenty-one days of this letter. In light of the length of time this case has been pending, the Court would not be inclined to grant any continuances beyond that date.

Sincerely yours,

/s/ Eugene F. Lynch

cc: Counsel
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Stephen A. Shefler

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., Plaintiff, v. CITY OF PALO ALTO, CALIFORNIA, a municipal corporation; CITY OF PALO ALTO UTILITIES, a municipal utility; CITY OF MENLO PARK, CALIFORNIA, a municipal corporation; and CITY OF ATHERTON, CALIFORNIA, a municipal corporation, Defendants.	NO. C 85 2161 EFL RESPONSE OF UNITED STATES TO QUESTION OF CONSTITUTIONALITY OF CABLE COMMUNICATIONS POLICY ACT OF 1984 Date: July 1, 1987 Dept: Courtroom 4 Hon. Eugene F. Lynch

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Introduction

The United State[s] of America hereby responds to this Court's certification to the Attorney General of the United States, by letter dated June 10, 1987, that a motion for summary judgment filed in this action has drawn into question the constitutionality of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.* (the "Cable Policy Act" or "Act"), as "an Act of Congress affecting the public interest" under 28 U.S.C. § 2403(a).

The Court in its letter states that the parties have specifically agreed that, "at the very least," the constitutionality of Secs. 611, 612, 621, 622, 623, 624, and 632 of the Act, 47 U.S.C. §§ 531, 532, 541, 542, 543, 544, and 552, respectively, are implicated. The Court's letter does not itself indicate in what respects any of the provisions are deemed to be unconstitutional. On August 5, 1985, counsel for plaintiff filed with the United States Attorney, pursuant to Local Rule 200(8), a notice of claim of possible unconstitutionality of the Cable Policy Act "if and to the extent" the Act were construed to authorize defendants to limit the number of cable television systems to fewer systems than could be physically accommodated. Neither party has otherwise invoked Rule 200(8) of the Local Rules of Practice of this Court, which requires that counsel raising the question of the constitutionality of an Act of Congress forthwith notify in writing the assigned judge and the United States attorney of the existence of such question, giving the title of the action, a reference to the questioned statute sufficient for its identification, and the respects in which it is claimed to be unconstitutional.

A review of the refiled complaint (Mar. 4, 1985) and answer (Apr. 16, 1985) (neither of which refer to the Act)

and recent pleadings in this action made available to counsel indicates that no party claims the Act or any of its provisions to be unconstitutional. Defendants, as municipal franchising authorities, rely upon the Act to assert that many of the requirements in their proposed ordinance for granting a franchise are mandated or expressly approved by the Cable Policy Act, discussing specifically requirements for (1) access for public, educational, or government ("PEG") use and leased cable channels for commercial use, (2) construction of a system reflecting "state-of-the-art" technology, (3) wiring of all neighborhoods to protect against "cream-skimming" in construction limited to the most profitable neighborhoods, and (4) financial arrangements involving performance and payment [b]onds, a security fund, and reimbursement for fees and costs; defendants assert that to invalidate them would mean declaring the Act of Congress to be unconstitutional. Defendants' memorandum of points and authorities in support (Apr. 17, 1987), at 1, *passim;* defendants' reply (May 8, 1987), at 1-16. Plaintiff cable television operator in turn relies upon the Act to assert that specified provisions of the proposed ordinance violate or are not supported by provisions of the Act; are unnecessary, "busybody" regulations either covered by specific provisions or inconsistent with the stated policies of the Act; impose undue economic burdens inconsistent with the stated policies of the Act; or inhibit free competition contrary to the stated policies of the Act. Plaintiff's Exhibit 3 in opposition (May 1, 1987), at 13-15. Plaintiff asserts that defendants' insistence that the constitutionality of the Act must be resolved is a false issue, since none of the challenged provisions is mandated by the Act, so that the validity of the Act's provisions will not be

affected by the invalidation of the challenged ordinance provisions. Plaintiff's memorandum of points and authorities in opposition (May 1, 1987), at 2.

After this Court held that plaintiff cable system operator had standing to bring its First Amendment challenge to the municipal franchise proposal selection process, *Century Federal, Inc. v. City of Palo Alto, Cal.*, 579 F.Supp. 1553 (N.D. Cal. 1984) (*Century Federal I*), it dismissed plaintiff's original First Amendment claims without prejudice, on the premise that the newly enacted Cable Policy Act endorsed the right of a franchising authority to offer an exclusive franchise. Orders of Nov. 24, 1984, Jan. 29, 1985. Thereafter, in *Century Federal, Inc. v. City of Palo Alto, Cal.*, 648 F.Supp. 1465 (N.D. Cal. 1986) (*Century Federal II*), plaintiff's First Amendment claims were reasserted because of the ruling of the Ninth Circuit in *Preferred Communications, Inc. v. City of Los Angeles, Cal.* 754 F.2d 1396, 1411 (9th Cir. 1984) (*Preferred I*), *aff'd and remanded, City of Los Angeles v. Preferred Communications, Inc.*, —U.S. —, 106 S.Ct. 2034 (1986) (*Preferred* II), that a municipality could not limit access to a single cable television system if the available facilities could accommodate more than one system. 648 F.Supp. at 1468. This Court observed that it had hoped that the Act would resolve this litigation, and that "*[t]he constitutionality of that Act is not being challenged in this litigation,* but the Ninth Circuit has called into question the constitutionality of a number of its provisions in strong dicta in the *Preferred I* decision." *Century Federal II*, 648 F.Supp. at 1468 (emphasis added).

Neither the parties nor the Court appear to suggest that there is any question of the constitutionality of the

Act taken in its entirety. The Court indicates that "at the very least" the provisions specifically identified are in question, suggesting others may also be in doubt, but the Court has also ruled as a matter of law that a franchise arrangement is within the cities' constitutional power of government. *Century Federal II*, 648 F.2d at 1475.

This response on behalf of the United States, accordingly, is necessarily limited, because it does not appear that specific issues on the constitutionality of provisions of the Act have been directly joined or adequately articulated by the parties to permit a complete analysis. In this regard, the United States notes that the issues presented in this litigation, like those in *Preferred II*, are of significant importance that should be resolved only after the development of a complete record. *See Preferred II*, 106 S.Ct. at 2037-38. The United States concludes that it is not appropriate to address the constitutionality of the Act in this litigation at this time.

A. Overview Of Cable Regulation

Cable television is linked to the nationwide broadcasting system, it implicates federal interests in interstate commerce and communications policy, and it thus falls within federal regulatory jurisdiction. Since 1960 the Federal Communications Commission ("FCC") has gradually asserted jurisdiction over cable television ("CATV") operation, including the carriage and nonduplication of local programming, "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," under its broad authority over interstate communication by wire or

radio conferred by the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* *United States v. Southwestern Cable Co.*, 392 U.S. 157, 165, 167-69, 178 (1968). Wishing "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, Congress conferred on the FCC a "unified jurisdiction" and "broad authority," quoting H. R. Rep. No. 1850, 73d Cong., 2d Sess. 1 (1934). 392 U.S. at 172. The Supreme Court has recognized the jurisdiction of the FCC to regulate the cable television industry, with its "explosive" growth and its "phenomenal" potential to augment available communications services, to enable the Commission to discharge its various responsibilities to further statutory policies. *United States v. Midwest Video Corp.*, 406 U.S. 649, 651, 664 (1972) (*Midwest Video I*) (plurality opinion).

At the same time, the technology of cable television requires the use of such local facilities as streets and rights of way, which are matters traditionally within the police power and regulatory jurisdiction of the states and their political subdivisions, the local governments, so that, from the earliest days of cable television, local governments have regulated cable systems through franchises and licenses.[1] Over the years, as the extent of FCC regu-

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[1] *See* S. Rep. No. 67, 98th Cong., 1st Sess. 5-7 (1983) ("Senate Report"). "Cable televsion * * * requires the use of public facilities, and this provides a justification for some government regulation. The City has legitimate interests in public safety and in maintaining public thoroughfares." *Preferred I*, 754 F.2d at 1406.

lation has evolved from increased extensive regulation towards greater deregulation, *see* Senate Report, at 7-12, it has also asserted preemptive control over various features of local franchises, under a program of "deliberately structured dualism," in accord with its authority to regulate cable systems in order to ensure achievement of the FCC's statutory responsibilities, *Capital Cities Cable, Inc. v. Crisp, Director, Oklahoma Alcoholic Beverage Control Bd.*, 467 U.S. 691, 702, 698-711 (1984).

The Cable Communications Policy Act of 1984 is designed to establish "a national policy that clarifies the current system of local, state and Federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." H. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 4656 ("House Report"). Among its stated purposes are to "establish a national policy concerning cable communications [and] * * * to establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems * * *." Sec. 601(1), (3), of the Act, 47 U.S.C. § 521(1), (3).

The Cable Policy Act thus falls well within the mainstream of traditional regulatory federal oversight and traditional local responsibility for franchising authority, as well as traditional federal/state relationships in a dual regulatory regime, amply reinforced by FCC and judicial interpretations over the years. The Act reflects settled concepts of legislative policy which "continues reliance on

the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process," House Report, at 19.

The Act makes clear that the authority exercised by a franchising authority does not rest on that statute itself, but is found elsewhere. Indeed, the Act defines the term "franchising authority" to mean "any governmental authority empowered by Federal, State, or local law to grant a franchise," Sec. 602(9), 47 U.S.C. § 522(9), obviously referring to laws other than the Act.[2] To protect federal interests implicated in cable regulation, the Cable Act sets forth in numerous provisions what a franchising authority may or may not do consistent with federal policy, establishing guidelines for the exercise of regulation over cable systems by the franchising authority. House Report, at 19. To enforce these guidelines, the Act provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." Sec. 636(c), 47 U.S.C. § 556(c). Thus cable television franchises rest on whatever local legal authority is available, limited by the guidelines of the Act, and kept within those limits by federal preemption.

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[2]As the Supreme Court explained in considering a First Amendment challenge to cable television franchise restrictions imposed by the City of Los Angeles, Congress in the Cable Policy Act "endorsed" municipal franchise systems created under state and local law. *Preferred II*, 106 S.Ct. at 2035 n.1.

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B. The Constitutionality Of The Cable Policy Act Is Not Implicated

Plaintiff, a cable television operator, challenges the requirements imposed by defendants, as franchising authorities, for the grant of a franchise. Defendants claim that their actions are fully consistent with the provisions of the Cable Policy Act.

However, in a challenge to a statute's constitutionality, a permissive regulatory action consistent with statute is not equivalent to an action required by the statute. *See FCC v. Florida Power Corp.*, — U.S. —, 107 S.Ct. 1107, 1112-13 (1987) (Pole Attachments Act authorizing FCC to set rates for utility pole rentals by cable television systems did not constitute a taking, since the Act did not give the cable television company a right to occupy space on the poles or prohibit a utility company from refusing to enter into attachment agreements with cable television operators). Here, the Cable Policy Act is not the source of any power that a local franchising authority, such as defendants, may have to grant an exclusive franchise or to impose the requirements complained of. Rather, the Act delineates the scope of federal preemption of local regulatory authority, and thereby preserves, within specific guidelines, local authority to impose such requirements. The extent to which the First Amendment limits local regulatory authority in its actions is an important question, but not one that brings the constitutionality of the Act into question, and thus not one that we here address in response to the Court's certification.

Defendants in addressing the proposed franchise terms in their motion for partial summary judgment, as-

sert that "many of these requirements are mandated or expressly approved by the Federal Cable Act and thus to invalidate them means declaring that Act of Congress unconstitutional." Defendants' memorandum in support (May 17, 1987), at 1. Asserting that the constitutionality of the Act is a false issue because the validity of the Act's provisions will not be affected by the invalidation of the challenged ordinance provisions, plaintiff avers that defendants' access, "state-of-the-art," and universal service demands (*see supra,* at 3) are unconstitutional, and the bulk of their financial requirements are invalid. Plaintiff's memorandum in opposition (May 1, 1987), at 2, 6-20. The Court in its letter of June 10, 1987, states that, "at the very least," the constitutionality of Secs. 611, 612, 621, 622, 623, 624, and 632 is implicated.

However, with the exception of leased access channels, discussed *infra*, at 17-18, to the extent that provisions of the Act may be implicated which permit or limit what the franchising authority may do, these and other sections of the Act do not themselves impose requirements on the operations of a cable system:

1. Sec. 611, 47 U.S.C. § 531: Cable Channels for Public, Educational, or Government ("PEG") Use

In their memoranda, the parties argue whether the access requirements in the proposed municipal franchise ordinance are constitutional under the First Amendment and the Equal Protection Clause, and whether they meet the test under *United States v. O'Brien*, 391 U.S. 367, 377 (1968), to justify government regulation which brings into play the First Amendment. Defendants' memorandum

(Apr. 17, 1987), at 3-10, plaintiff's memorandum (May 1, 1987), at 8-11, defendants' reply memorandum (May 8, 1987), at 4-10). Neither party, however, raises a question whether the access provisions in Sec. 612 of the Cable Policy Act are constitutional, and indeed the cities as the franchising authority acknowledge that the PEG provisions in the Act are not mandatory. Defendants reply memorandum (May 8, 1987), at 4.

Sec. 611 of the Act provides, in general, that a franchising authority "may" establish and enforce franchise requirements, including requests for proposals and renewals, that channel capacity be designated for PEG use, but "may not" exercise editorial control over such use. The entire thrust and tone of Sec. 611 is permissive only, not mandatory, in defining what a franchising authority "may," not "shall," do in establishing franchise and request for proposal requirements for PEG use, services, facilities, or equipment. The legislative history of Sec. 611 further reflects the intent of Congress that it "continues the policy of allowing cities to specify" such use, House Report, at 30, in furtherance of the design of Congress to define the limits of permissive authority granted to the franchising authorities, *id.*, at 45-47.

2. Sec. 621, 47 U.S.C. § 541:
General Franchise Requirements

The provision of the Act addressing the number of franchises which may be granted is likewise permissive, not mandatory:

> A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction.

Sec. 621(a)(1), 47 U.S.C. § 541(a)(1). The Ninth Circuit stated in *Preferred I* that the provision must be narrowly construed, 754 F.2d at 1411 n.11. As explained in the solicitor General's brief on certiorari, "There may be circumstances in which the grant of only one franchise is fully justified, and in such circumstances the Act authorizes the granting of a single franchise." Amici Brief, at 12 n.5. The Supreme Court itself, in holding in an exclusive franchise case that First Amendment values must be balanced against competing societal interests, *Preferred II*, 106 S.Ct. at 2038, did not suggest that the constitutionality of the Act was also at issue, and indeed clearly indicated that the Act was not the source of the franchising authority. 106 S.Ct. at 2035-36 n.1.

This Court has resolved any dispute on the propriety of the requirement that a cable operator must obtain a franchise to provide cable service, Sec. 621(b)(1), 47 U.S.C. § 541(b)(1), holding that as a matter of law, a franchise arrangement is within the constitutional power of government of the cities as the franchising authorities. *Century Federal II*, at 1475. The Supreme Court noted in *Preferred II* that Congress in the Cable Policy Act has "endorsed" municipal franchise systems created under state and local law. 106 S.Ct. at 2035 n.1.

This Court has also previously ruled that the exclusive franchising arrangement proposed by the cities in this case to limit to one the number of cable operators to be granted a franchise does not further a substantial government interest in minimizing disruption to the public domain, and, therefore, violates the First Amendment on its face. *Century Federal II*, 684 F.Supp. at 1475-76. There is thus no need or occasion to address in this response the constitutionality of Sec. 621 of the Act.

3. Miscellaneous Provisions: Sec. 622, 47 U.S.C. § 542: Franchise Fees; Sec. 623, 47 U.S.C. § 543: Regulation Of Rates; Sec. 624, 47 U.S.C. § 544: Regulation of Services, Facilities, and Equipment; Sec. 632, 47 U.S.C. § 552; Consumer Protection

Each of these provisions also identified by the Court in its letter of June 10, 1987, is also permissive, not mandatory: a cable operator "may" be required to pay a franchise fee, Sec. 622(a); a federal agency or state "may not" regulate rates, but a franchising authority "may" regulate rates, Sec. 623(a); a franchising authority "may not" regulate services, franchises, and equipment except as provided, Sec. 624(a); and a franchising authority "may" require provisions for enforcement of customer service requirements, Sec. 632(a).

In all of these instances, the constitutionality of the Act is not drawn into question, because state and local law and the franchising authority's police power, not the Act, are the source of power, if any, for the franchising authority to impose these requirements. The Act is indifferent to whether a franchising authority in a particular case does in fact impose these conditions; it only establishes limitations which preempt or supersede state or local laws or franchises which impose requirements inconsistent with the Act.

Although the parties have briefed, in their recent round of pleadings, the constitutionality under the First Amendment and Equal Protection Clause only those provisions relating to cable access, state-of-the-art, anti-cream skimming, and financial requirements, *see supra*, at 3, the Court has stated in its letter of June 10, 1987, that "at the

very least," the constitutionality of Secs. 622, 623, 624, and 632, in addition to Secs. 611, 612, and 621 of the Act discussed *supra*, are implicated. The United States is not able to address the issue of the constitutionality of any additional sections of the Act which are not otherwise identified and may or may not be implicated.

Assuming the franchising requirements at issue in this proceeding are consistent with the relevant provisions of the Act, then the Act simply provides that they are not preempted by the national cable communications policy.[3] But the constitutionality under the First Amendment of the requirements imposed by defendants is wholly unrelated to the constitutionality of the Act. The Court may therefore decide the constitutionality of these requirements without addressing the constitutionality of the Act.

It is settled judicial practice to avoid the unnecessary decision of constitutional issues. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978), *reh. denied*, 439 U.S. 883 (1978). This is not a case where a determination of the constitutionality of provisions of an Act of Congress is "absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905). "[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' a court should adopt that construction." *California v. Yamasaki*, 442 U.S. 682, 693 (1979), quoting *Crowell v. Ben-*

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[3]*Cf. Channel One Systems, Inc. v. Connecticut Dept. of Public Utility Control*, 639 F.Supp. 188, 196 (D. Conn. 1986) ("Connecticut's franchising statutes which are consistent with the Cable Act are not preempted by federal law").

son, 285 U.S. 22, 62) (1932). It is unnecessary here to address the question whether there is "a serious doubt" of the constitutionality of the Cable Policy Act, because it is not only "fairly possible," but compelled by the language of the Act, to avoid its construction on the issue of constitutionality.

C. The Constitutionality Of Leased Access Channels For Commercial Use Is Not Properly Before the Court

Section 612 of the Act, 47 U.S.C. § 532, mandates that cable systems with a capacity of at least 36 channels be required to designate channel capacity for leased commercial use under a formula fixed by statute.

As a threshold matter, it does not appear that leased commercial channel requirements are properly at issue at this time. Sec. 612 does not become operative until a system has a minimum of 36 channels. To the extent the proposed municipal franchise ordinance proposes to require that eight leased channels be provided by applying the formula in Sec. 612 of the Act to the channel capacity of the proposed system, Ordinance No. 3744, at ¶ 3.7, this is function of the cities' channel capacity requirements, not of Sec. 612, which mandates no minimum number of channels, but only defines the number of leased access channels required, dependent on the size of the system. It is only the propriety of the channel capacity requirements of the proposed ordinance, not the constitutionality of Sec. 612, which can presently be at issue in this proceeding.

In addition, it appears to be unnecessary and inappropriate to examine the constitutionality of Sec. 612 at this

time, because, if plaintiff goes forward with its proposal to build a cable system to operate within the cities' boundaries, it may have the opportunity to elect to build less than 36 channels on its system. In that case, the requirements of Sec. 612 by its terms would not apply to plaintiff, and there would then be no basis to challenge the constitutionality of Sec. 612.

In *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 716 (8th Cir. 1986), the Eighth Circuit, recognizing that "there are profound First Amendment implications inherent in the regulation of cable operators," declared that "we make clear, as did the Supreme Court in *Preferred Communications*, that we are unwilling to decide any question which is not squarely before us and on which there has not been a full development of the record." The issue whether a provision of an Act of Congress embracing the same subject is unconstitutional is so fraught with importance and consequence that it should be determined only where the issues have been squarely raised, the considerations have crystalized, and a record has been fully developed.

CONCLUSION

For the foregoing reasons, the United States submits as its response to the Court's certification of the question of the constitutionality of the Cable Policy Act, (1) that it is premature to address the question of the constitutionality of Sec. 612 in the absence of a claim of unconstitutionality, a specification of the respects in which it is considered by any of the litigants to be unconstitutional, and a determination that preconditions for its ap-

plicability have been satisfied and that the issue is ripe for decision, and, (2) with respect to other provisions of the Act, that they are permissive only and that their constitutionality need not and should not be addressed in this action.

Respectively submitted,

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Dated: June 30, 1987

/s/ THEODORE HIRT

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
NORTHERN DISTRICT OF CALIFORNIA

CENTURY FEDERAL, INC., a California Corporation, Plaintiff,	NO. C 85 2168 EFL
v.	DECLARATION OF SERVICE
CITY OF PALO ALTO, CALIFORNIA, a municipal corporation; CITY OF PALO ALTO UTILITIES, a municipal utility; CITY OF MENLO PARK, CALIFORNIA, a municipal corporation; and CITY OF ATHERTON, CALIFORNIA, a municipal corporation, Defendants.	(Filed October 9, 1987)

I am a citizen of the United States, over the age of eighteen years and not a party to this action. I am employed in Alameda County, and my business address is 401 Grand Avenue, Oakland, CA 94601.

On October 9, 1987, I served the OFFER OF JUDGMENT and ACCEPTANCE OF OFFER OF JUDGMENT on all parties of record, including the party offering the judgment, by delivering by hand a copy of the documents to the following:

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I certify under penalty of perjury that the foregoing is true and correct, and was executed on October 9, 1987, at San Francisco, California.

/s/Anne M. Ronan

RELEVANT PROVISIONS OF APPELLANTS' CABLE FRANCHISING ORDINANCE

ORDINANCE NO. 3744

ORDINANCE OF THE COUNCIL OF THE CITY OF PALO ALTO APPROVING AND AUTHORIZING THE AWARD OF A FRANCHISE TO CENTURY FEDERAL, INC., PURSUANT TO AN ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

WHEREAS, the City of Palo Alto is a party defendant in a lawsuit entitled *Century Federal, Inc., v. City of Palo Alto, et al.*, now pending in the United States Federal District Court for the Northern District of California; and

WHEREAS, the City is required by an order of said court to introduce and adopt an ordinance granting a cable television franchise to Century Federal, Inc.,

NOW, THEREFORE, the Council of the City of Palo Alto does hereby ORDAIN as follows:

SECTION 1—DEFINED TERMS

Unless the context clearly indicates that a different meaning is intended:

* * *

1.44 "State-of-the-Art" means that level of technical performance or capacity, service, plant or other equipment, production or other facilities, or construction techniques which has been developed and demonstrated to be workable and economically feasible and viable from time to time throughout the term of this franchise.

SECTION 3—SERVICE OBLIGATIONS

3.1 To the maximuum extent permitted by federal statute or regulation, the Company shall construct, operate, and maintain the System as a State-of-the-Art Broadband Communications Facility offering the full range of Services, facilities, and equipment that can be made available through such a Facility, as provided in Appendix A, to this Ordinance, or FCC Report and Order Docket 85-38, whichever is allowed by the Cable Act.

3.2 Throughout the term of this franchise, the Company shall promptly furnish, maintain, and, except as provided in the second sentence of Section 9.2.04 hereof, continue to offer all Services distributed over the System to any Person lawfully occupying a Residential Dwelling Unit and, subject to the provisions of Appendix B to this Ordinance, any other Person within the Service Area, upon request and payment of all applicable charges, as set forth in disclosures of charges made to the City pursuant to this Ordinance, provided that such request is not inconsistent with the terms, conditions, and schedule for construction, as provided in this Ordinance, and provided further that the Company is able to obtain access to each Person's premises in order to furnish, maintain, and continue to offer Service to said Person. The Company shall not abandon the System, in whole or in a not insubstantial part, without the prior written approval of the City Council. The inability of the Company to obtain or continue to obtain access to any Residential Dwelling Unit located on a premises which contains more than four Residential Dwelling Units upon terms and conditions reasonably acceptable to the Company and subsequent failure to provide or to continue to provide service to such Residential Dwelling

Unit shall not be deemed to be an abandonment of the System.

3.3 * * *

3.4 * * *

3.5 * * *

3.6 The Company, itself or through third parties, shall offer on the Subscriber System, the Institutional Cable, or both, a full range of other services designed to satisfy the needs, for the services made available through Broadband Communications Facilities, of business and commercial entities in the Service Area, and residents and non-profit entities in the Service Area for specialized data Services, consistent with Sections 3.1 and 3.2 hereof. As provided in this Ordinance, said Services shall include the capacity to provide one-way, two-way, interactive, and machine-to-machine transfer of audio, video, voice, and data Signals both within the System and to and from sources outside the System through the interconnection of the System, consistent with all applicable laws.

3.7 *Leased Services*

3.7.01 The Subscriber shall contain initially at least eight (8) Leased Channels, including access to the upstream capacity specified in Appendix A to this Ordinance, which number has been derived by applying the formula contained in Section 612 of the Cable Act to the capacity of the System. The Leased Channels shall be distributed at Channel Numbers to be selected by the Company. If, during the initial term of the franchise, the number of Leased Channels to be supplied by the Company pursuant to Section 612 of the Cable Act increases from the number

of Leased Channels specified in this Section 3.7.01, then the Company shall comply with the requirements of said Section 612. If Section 612 of the Cable Act is amended such that it (i) ceases to apply to the Company or the System, or (ii) permits the Company to offer fewer Leased Channels than are currently required under Section 612, then the Company shall not offer fewer Leased Channels than the number contained in this Ordinance which is the number of leased channels required to be supplied by the Company pursuant to Section 612, without the prior agreement of the City.

3.7.02 Subject to Section 612 of the Cable Act and other applicable law, the Leased Channels shall at all times be available for programming and other Services by Persons other than the Company and Affiliated Persons at negotiated terms and conditions, in accordance with disclosures of rates made to the City, the rules to be established pursuant to the plan required by Section 3.7.04 hereof. Neither the Company nor any Affiliated Person shall distribute any Service over any Leased Channels, except as provided in Section 612(b)(4) of the Cable Act.

3.7.03 At reasonable times during which each Leased Channel is being used, in whole or in part, for the distribution of any Service by the Company of an Affiliated Person, the Company shall cause a notice to appear on said Channel advising all Persons that said Channel is available for lease and specifying whom should be contacted in order to lease said Channel.

3.7.04 The Leased Channels shall be administered by the Company in a manner which makes possible competition in the delivery of Services and diversity of program-

ming and information sources. At such time as the City reasonably determines that because of amendments to the Cable Act the City should take additional responsibilities for the administration of Leased Channels, the City may require the Company to develop a plan for the administration of said Channels. Said plan shall:

(i) Be submitted to the City Manager within three (3) months after it is requested and shall take effect one (1) month thereafter unless the City Manager notifies the Company, in writing, that he does not reasonably concur in said plan;

(ii) Be updated from time to time as reasonably necessary, and no material modification thereto shall become effective if the City Manager notifies the Company, in writing, within one (1) month after receipt of said modification that he does not approve said modification;

(iii) Describe the details for ensuring that the Company will make available the Leased Channels to all Persons, or, upon request of any Person, time segments of reasonable duration on the Leased Channels, on a first-come, first-served basis and on such other terms and conditions which shall not discriminate between comparable uses and users of the Leased Channels, provided that the Company may negotiate or establish different rates or terms for different types of uses or categories of users;

(iv) Set forth the rules, in accordance with the provisions of this Agreement, governing the application for, availability of, and use of Leased Channel time and Service Related Activities by Leased Channel users; and

(v) Specify the agreement which the Company shall require each Leased Channel user to execute in order to

provide that Leased Channel users comply with the various provisions of this Agreement which govern the obligations of Company in connection with the distribution of any Service over the System, including, without limitation, the requirements of Section 5.1, 9.1, 9.2, 10.1.05, and 16 hereof.

3.7.05 In the event that amendments to Section 612 of the Cable Act or other provision of federal law allow an increase in Leased Channel capacity, and in order to ensure that, throughout the term of this franchise, there shall be a sufficient number of Leased Channels to satisfy the demand for such Channels by Persons other than the Company and Affiliated Persons, at any time following the third (3rd) year of the initial term of this franchise, upon a determination by the City Manager and the Company that the existing Leased Channels are being substantially utilized and that a substantial and demonstrated need exists for one (1) or more additional Leased Channel(s), then the Company shall supply up to two (2) additional Leased Channel(s) without decreasing the number of Government or Access Channels, as promptly as possible, but in no event later than six (6) months after said determination. If consistent with applicable law, following the initial term of the franchise, the City Manager may request the Company to supply Leased Channels in addition to those required by this Section 3.7 by requesting the Company to increase the number or capacity of Channels or cables on the Subscriber System.

3.8 * * *

3.9 *Continuing Obligation*

3.9.01 Throughout the term of this franchise, the Company shall: (i) maintain and upgrade the services dis-

tributed over the system and the technical performance of the system so as to keep pace with developments in the State-of-the-Art of Broadband Communications Facility technology, to the extent the Company and the City reasonably mutually determine that it is economically viable and feasible to do so, and (ii) either on its own initiative or at the request of the City Manager, participate in or undertake experiments, tests, and other activities to enhance and advance the State-of-the-Art of Broadband Communications Facility technology, to the extent the Company and the City reasonably mutually determine that it is economically viable and feasible to do so; and provided that, such experiments, tests, and other activities are technically sound and undertaken in response to a mutually defined market demand. The City Council may, at any time, conduct a public hearing to determine whether the Company has complied fully with this obligation, and may, as a result of such hearing, take appropriate action to ensure compliance with this obligation; provided that, the Company shall be given reasonable written notice of non-compliance with this obligation and a reasonable period of time within which to cure such non-compliance.

3.9.02 (THERE IS NO SECTION WITH THIS NUMBER.)

3.10 Neither the City, the Community Access Organization, nor any other government-created entity shall engage in any program censorship or other control of the content of the programming on the System, except as otherwise required or permitted by law, provided that, (i) the City may exercise editorial control over programming on the Government Channels, and (ii) the Community Ac-

cess Organization (the "CAO") may exercise editorial control over programming on those portions of Access Channel time which may be programmed in whole or in part by the CAO.

SECTION 4—PUBLIC SERVICES

4.1 The Company shall, as provided in this Section 4 and Appendices E and F of this Ordinance, make available to the City, a variety of facilities and equipment for the creation, development, and use of Government Channels, Access Channels, and the Institutional Cable. The requirements of this Subsection for facilities and equipment may be satisfied by the Company's independently providing the facilities and equipment specified, or doing so by entering into a written agreement with one or more other franchisees in the Service Area jointly to furnish a single set of such facilities and equipment. Such agreement shall be approved by the City in order to so satisfy the requirements on this Subsection. All such Channels, facilities, and equipment provided by the Company shall be held by the City for the benefit of all subscribers to the System and the public, and, as may be appropriate in some cases, the Company. Said Channels, services, facilities, and equipment may be designated for specific initial uses in this Ordinance; however, the City Council reserves the right, subject to the provisions of this Ordinance, to alter, without prior consultation with the Company, any or all such initial designations for non-profit access and institutional uses consistent with this Ordinance and all applicable laws.

4.2 *Government Channels*

4.2.01 The Company shall initially supply to the City, without charge, a minimum of: (i) two (2) activated Video Channels on the Subscriber System which the City may elect to use, in whole or in part, for video, audio, or data Services, and (ii) access to the upstream capacity specified in Appendix A to this Ordinance. Said Channels shall be the Government Channels and shall be used by the Joint Powers. All Government Channels supplied pursuant to this Section 4 shall be distributed at Channel Numbers to be fixed by the Company, in consultation with the City Manager. The City Manager may, at any time, direct that any one (1) or more of the Government Channels be allocated to Basic Services, and, as appropriate in accordance with this Section 4, Enhanced Services.

4.2.02 The Government Channels may be used by the City for any lawful, non-profit governmental purpose. The City and the Company may jointly agree on terms upon which a Government Channel may be offered or used for Leased Access purposes in the event either the City or the Company deems offering such Channel capacity for such commercial purposes desirable.

4.2.03 Except as provided in Section 4.2.02 hereof, the Company shall not prohibit or limit any Service or category of Services distributed over the Government Channels, which is consistent with this Section 4 and the technical characteristics of the System, as provided in Appendix A to this Ordinance.

4.2.04 Subject to the second sentence of this Section 4.2.04, at any time following the fifth (5th) year of the

initial term of the franchise, upon a determination by the City Manager and the Company that then existing Government Channels are being substantially utilized and that a substantial and demonstrated need exists for one (1) or more additional Government Channels, then the Company shall supply such additional Government Channels, without decreasing the number of Leased or Access Channels, as promptly as possible, but in no event later than six (6) months after said determination. During the initial term of the franchise, the Company shall not be obligated to provide to the City a total of more than three (3) activated Video Channels as Government Channels, provided that, in order to provide Channel capacity for use by the City in addition to said three (3) Video Channels, the Company shall, upon request of the City Manager, permit the City to lease from the Company, for noncommercial purposes, any one (1) or more of the Lease Channels, or portion thereof, at a rate not to exceed one-half (½) of the lowest then prevailing commercial rate charged by the Company for any comparable Lease Channel, or portion thereof, excluding charges for experimental or start-up Services, as soon as said Leased Channel(s), or portion(s) thereof, become(s) available.

4.2.05 (THERE IS NO SECTION WITH THIS NUMBER.)

4.2.06 In the event the City or the CAO desires that Channel capacity, facilities, services, or equipment be provided to commercial users (including municipal utilities) of the city or the CAO, the Company shall be compensated for the value thereof at rates to be agreed upon between the appropriate parties (the Company and the City, or the

Company and the CAO) in their sole discretion. Such compensation may take the form of a trade or exchange of services as the parties may agree.

4.3 *Access Channels*

4.3.01 As part of the Basic Services on the Subscriber System, the Company shall initially supply to the City, without charge: (i) a minimum of three (3) activated Video Channels, which the City or the CAO may elect to use, in whole or in part, for video, audio, or data Services, and (ii) access to the upstream capacity specified in Appendix A to this Ordinance. Said Channels shall be the Access channels and shall be dedicated to public, educational, and other institutional use. All Access Channels supplied pursuant to this Section 4.3 shall be distributed at Channel Numbers to be selected by the Company.

4.3.02 The Access Channels shall be placed under the jurisdiction of the CAO, to be established pursuant to the Joint Powers Agreement and operated and designated as provided in Appendix E to this Ordinance. Said Access Channels shall be used for public, educational, or charitable purposes, and for any other purpose agreed to between the Company and the CAO, including any other Service for which a per-program or per-Channel charge is imposed by the CAO.

4.3.03 The Company agrees to supply and make available to the CAO designated in writing by the City, which designation may be changed from time to time, without charge or for a nominal fee, either by itself or by agreement in writing with any other franchisees of City, all of the equipment and facilities as provided in Appendix E

to this Ordinance. The Company shall retain title to such equipment and facilities and shall have the right to substitute equivalent facilities and equipment from time to time, subject to the CAO's approval.

4.3.04 Rules and regulations shall be adopted by the CAO, in consultation with the City, to govern the use of Access Channel time, equipment, facilities, and other services to ensure that said time, equipment, facilities, and other services are available on a fair, open, and nondiscriminatory basis. Said rules and regulations shall also provide for the CAO to receive, pursuant to a pre-development agreement negotiated between the Company and the CAO, an appropriate portion of the financial benefits, if any, received by the Company or any Affiliated Person in connection with the use in any other Broadband Communications Facility of any access or local origination programming or services developed by or on behalf of the CAO or by the Company in cooperation with the CAO, pursuant to said agreement, for use on the System. The Company shall not prohibit or limit any service or class of services distributed over the Access Channels to the extent that said service or class of services is consistent with the purposes set forth in Section 4.3.02.

4.3.05 Rules and regulations shall also be adopted by the CAO and the company jointly to govern the use of that portion of the Institutional Cable to be made available for educational uses, as specified in Appendix F to this Ordinance. Said rules shall ensure that the Institutional Cable is available to educational institutions on a fair, open and nondiscriminatory basis.

4.3.06 Subject to the second sentence of this Section 4.3.06, at any time following the fifth (5th) year of the initial term of the franchise, upon a determination by the City Manager and the Company that then existing Access Channels are being substantially utilized and that a substantial and demonstrated need exists for Access Channels in addition to the three (3) Access Channels supplied pursuant to Section 4.3.01 hereof, then the Company shall supply such additional Access Channels, without decreasing the number of Leased or Government Channels, as promptly as possible, but in no event later than six (6) months after said determination. During the initial term of the franchise, the Company shall not be obligated to provide a total of more than five (5) activated Video Channels as Access Channels.

4.4 Fallow Time on Government and Access Channels

If there is any unused time on any Government or Access Channel and the Company or any Affiliated Person desires to distribute any Service over said Channel(s) during said unused time, then the Company or the Affiliated Person shall so notify in writing the City Manager, in the case of any Government Channel, or the CAO, in the case of any Access Channel. Said notice shall demonstrate that there then exists no demand by any other Person, including the CAO in the case of an Access Channel or the Joint Powers in the use of a Government Channel, for the unused time. The Company or the Affiliated Person may commence the distribution of the Service over the Channel(s) at the end of the fifteenth (15th) day following receipt of said notice by the City Manager or the CAO unless the City Manager or the CAO notifies the Com-

pany, in writing, that he or it does not consent to the use of the Government or Access Channel(s) by the Company or any Affiliated Person which consent shall not be unreasonably withheld. The City manager or the CAO, as applicable, shall specify in writing and in reasonable detail his or its reasons for denying such use. In the event that the City Manager or the CAO authorizes the Company or any Affiliated Person to utilize any Government or Access Channel(s), the Company or the Affiliated Person so authorized shall promptly relinquish such use upon receipt of a request by the City Manager, in the case of any Government Channel, or the CAO, in the case of any Access channel, but in any event such use shall be relinquished not later than ninety (90) days after receipt by the Company of such request. At all times during which each Government or Access Channel is not being used for the distribution of any Service, and at reasonable times during which each Government or Access Channel is being used for the distribution of any Service by the Company or an Affiliated Person, the Company shall cause a notice, in the form to be developed in consultation with the City Manager and the CAO, to appear on the System, advising all Persons that said Channel is, as applicable, a Government or Access Channel available for use in accordance with this Section 4.

4.5 *Institutional Cable*

4.5.01 As provided in Appendices A and F to this Ordinance, the Company shall: (i) construct, and thereafter throughout the term of this Agreement, operate and

maintain a fully two-way cable that is midsplit or supersplit, and (ii) in connection with said cable, provide services, equipment, facilities, and support to the City for educational and governmental uses. Said cable shall be capable of providing one-way, two-way, interactive, and machine-to-machine transfer of audio, video, voice, and data Signals within said cable and to and from sources outside the System, through the interconnection of the System as provided in this Ordinance. The following is a list, by way of example but not limitation, of the types of services which said cable shall have the capability of providing: two-way videoconferencing; high speed data transfer; access to informational services; medical information interchange; facsimile reproduction; and energy management. A portion of the capacity of said cable shall be made available for use by the City and by other governmental and educational institutions, as provided in Appendix F to this Ordinance.

4.5.02 The cable or the bandwidth, as the case may be, supplied pursuant to Section 4.5.01 hereof shall be the Institutional Cable and that portion of the Institutional Cable so designated in Appendix F of this Ordinance shall be available for use by the City and by other governmental and educational institutions. The City may utilize said portion of the Institutional Cable to provide the City with the means to develop and distribute governmental services to the public over the Subscriber System, to develop plans for, test, and implement the use of Broadband Communications Facilities, including the System, as an integral part of governmental operations, and for any other lawful, governmental purpose; provided that, such

use shall not impose technical interference with the operation and physical uses of the Institutional Cable by the Company and that such testing shall only occur with the prior written consent of the Company. The use of the Institutional Cable by educational institutions shall be in accordance with the rules established by the CAO pursuant to Section 4.3.05 to this Ordinance and shall be limited to public, educational, or charitable purposes. Neither the City nor such institutions may sublease capacity on the Institutional Cable to commercial entities.

4.5.03 If there is unused capacity on that portion of the Institutional Cable which is available for use by the City and by other governmental and educational institutions, then the Company may petition the City Manager for consent to utilize said unused capacity on a temporary basis, which consent may not be unreasonably withheld. If the City Manager authorizes said use by the Company or any Affiliated Person, then, upon notice to the Company by the City Manager, the Company shall promptly, but in no event later than one hundred fifty (150) days after receipt of said notice from the City Manager, cease its use of said capacity and return said capacity for use by the City and by other governmental and educational institutions. Within two (2) years from the effective date of this Ordinance, the City shall promulgate reasonable rules, regulations and procedures for use of unused capacity pursuant to this Section 4.5.03, which shall be consistent with this Ordinance.

APPENDIX A

SYSTEM CHARACTERISTICS AND TECHNICAL PERFORMANCE/TESTING REQUIREMENTS

SECTION I. SYSTEM CHARACTERISTICS

A. Technical Features

1. Headend/Hub Design, Location and Intra-system Connection

The Company will provide a single headend. The location will be determined prior to construction. (It is anticipated that its location will be within the Service Area, subject to consultation with the City.) The facility will include a building of adequate size, ——, including offices, warehouse, studio facilities and parking.

2. Number/Type/Bandwith of Cables

The system will consist of two coaxial cables. One cable ("the A cable") will be activated immediately. The second cable ("the B cable") will be held in reserve for the first two years. During year three, approximately 10 miles of the B cable will be activated to provide service for commercial and institutional users. The City may require that up to an additional 20 miles of the B cable be activated during year four, and that up to an additional 20 miles of the B cable be activated during year five. The remaining portion of the B cable will be held in reserve until there is need for its capacity.

The A cable will be a 550 Mhz, sub-split facility. The B cable will be a 550 Mhz mid-split or super-split facility. The B cable will be initially installed with amplifier casings that can be user to house amplifiers at the time of activation.

The Company will activate the remaining portion of the B cable when the projected revenues from the activation of the B cable exceed the projected costs of activation for the remaining term of the franchise, when the Company has retained sufficient earnings from any net available surpluses to finance the activation of the B cable primarily out of retained earnings, and when there is a demonstrated need for the B cable's capacity. The Company reserves the right to determine when the remaining portion of the B cable (other than the 10-50 miles activated in years three to five) shall be activated and whether it shall be mid-split, super-split or otherwise configured.

3. Signal Reception/Distribution Techniques

* * *

4. Interactive Capability

The sub-split amplifiers on the A cable will allow for full interactive capability in the cable distribution plant. At the time that the B cable is activated, it will have a similar interactive capability. This capability, on the A cable initially and on the B cable in the future, will be augmented by headend equipment that will provide for necessary frequency translations and status monitoring. While the final selection of equipment and protocols will be determined at the time of initial activation, it is anticipated that some of the channel capacity will be utilized to support Sytek equipment and protocols. The Company anticipates working with other organizations, including the Cable Research Foundation, to demonstrate the feasibility and suitability of other equipment and protocols. Additional equipment may be added to the cable plant from time to time (e.g. Packet Technologies equipment) to

enhance its interactive capability at the discretion of the Company.

5. Emergency Override

6. Standby Power

* * *

7. Parental Control Options

Primary parental control security will be provided by the converter used to provide basic service. The Zenith Z-TAC converter that will be used for basic service contains a simple, flexible parental control system that will allow parents to prevent children from choosing particular channels. Additional devices will be available for sale or lease to meet the requirements of the Agreement.

(Exhibits Omitted)

APPENDIX F

ADVANCED SERVICES DEVELOPMENT

I. TECHNICAL CHARACTERISTICS OF SYSTEM WITH RESPECT TO ADVANCED SERVICES DEVELOPMENT

The Company agrees that a portion of the channel capacity of the Subscriber System shall be reserved for advanced services development and institutional uses of cable. In addition to the community programming channel, the public access channels and the government channels, the Company agrees that one downstream channel and one upstream channel on the A cable shall be reserved for advanced services development. In addition to the public access and government channels specified in Appendix A,

section B, 1, c, (1) and the upstream capacity specified in Appendix A, section D, at the time the B cable is activiated, an additional five (5) downstream channels and at least three (3) upstream channels shall be reserved for advanced services development. At least fifty per cent (50%) of this channel capacity shall be reserved, during the initial five years following the effective date of this Agreement, for the priority use by public and private non-profit institutuions and government agencies. Such public and private non-profit institutions shall be eligible to receive additional services, on the remaining portion of the channel capacity reserved for advanced services development, and in later years, at the lowest discounted rate offered to other users. Any portions of the channel capacity reserved for advanced services development that are not being used at any particular time may be used by the Company for other purposes.

II. MODIFICATIONS OF THE TERMS OF APPENDIX F

This Appendix F may not be modified or amended without the prior approval of the City Manager and the CAO: provided that approval by the CAO shall not be necessary if the CAO has not been incorporated, as provided for in Section I of this Appendix F.